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No. 04-___

In The
Supreme Court of the United States

WILLIAM B. CALDWELL, III, and
BEN FRANK BILLINGS, III, for Themselves and as Representatives of a Class of Similarly Situated Persons,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should a Trails Act taking (as discussed in this Court's *Preseault v. ICC* decision) be analyzed as a *per se* physical taking of an easement in land, or as a regulatory taking of that easement?

II. If a government agency authorizes a third party to take possession of a citizen's land upon the third party's satisfaction of certain conditions, does a taking occur (a) upon the issuance of the regulatory authorization or (b) when (and if) the third party satisfies the conditions and takes possession?

PARTIES TO THE PROCEEDINGS BELOW

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PETITION FOR WRIT OF CERTIORARI

William B. Caldwell, III, and Ben Frank Billings, III, for themselves and as representatives of a class of similarly situated persons, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The December 14, 2004 opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1) is published at 391 F.3d 1226. The June 30, 2003 opinion of the U.S. Court of Federal Claims (Pet. App. 25) is published at 57 Fed. Cl. 193.

JURISDICTION

This Court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and Rules 13.1 and 13.3 of this Court. This is a petition for writ of certiorari to review a decision of the U.S. Court of Appeals, Federal Circuit dated December 14, 2004. On January 28, 2005, the Petitioners filed a timely petition for rehearing en banc in the Court of Appeals for the Federal Circuit, which was denied by that court on March 23, 2005.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at 57-71.

STATEMENT OF THE CASE

Petitioners own land burdened by a Georgia railroad right-of-way. They brought suit under the Tucker Act on behalf of themselves and a putative class of nearly 400 landowners to recover compensation for the taking of private property worked by the National Trails System Act

("Trails Act") and first discussed in *Preseault v. ICC*, 494 U.S. 1 (1990). Over a vigorous and cogent dissent, the Federal Circuit deemed their claims untimely. Petitioners ask the Court to address when and how the Trails Act taking occurs – and in doing so, to correct an erroneous decision of the Federal Circuit that not only prematurely bars claims in Trails Act taking cases brought across the country,[1] but infects determinations of ripeness, standing and compensation in every such case or similar case.

Ben Frank Billings, III and William Caldwell, III ("the Petitioners") are fee simple owners of land in Columbus, Georgia that was burdened by a railroad easement owned by Norfolk Southern Railroad Company ("Norfolk Southern" or "the Railroad"). On October 9, 1996, pursuant to the Trails Act, Norfolk Southern purported to convey its interest in a portion of the railroad right-of-way known as the "Warm Springs Line" by deed to the City of Columbus ("the City"), which planned to operate it as a public trail.

On October 7, 2002, Billings and Caldwell filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 58), on behalf of themselves and a putative class of similarly situated landowners, alleging the conversion to trail use had effected a Fifth Amendment taking. However, the Court of Federal Claims dismissed the complaint on the ground that the Petitioners had not filed it within the six-year statute of limitations provided in 28 U.S.C. § 2501. The Court of Federal Claims, approaching the case as a regulatory taking, found that the Petitioners' claims accrued not when the Petitioners' reversionary[2] interests were taken through the Railroad's

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[1] As discussed in further detail *infra* at 18, the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals in all federal suits founded on the Constitution, including the taking claims alleged in this case.

[2] "Reversion," used strictly as a term of art, only refers to a future interest in land that remains after an estate in land (*e.g.*, a life estate)

(Continued on following page)

conveyance of its property to the City (as trail operator), but when the Railroad and the City entered into a purchase and sale agreement for the Warm Springs Line. (Pet. App. 25-50).

The Petitioners appealed, and the Federal Circuit affirmed, but rejected the Court of Federal Claims' analysis of the accrual date. A majority of the panel instead found that the Petitioners' claims accrued even earlier – when the Surface Transportation Board ("STB")[3] first issued a notice pursuant to the Trails Act beginning a negotiating period between the Railroad and the City – because that was the date of the last "government action" leading to trail use. (Pet. App. 1-18). Judge Newman dissented, agreeing with the Petitioners that their claims could not have accrued before the City took possession of the land for trail use. (Pet. App. 18-24). The court rejected *en banc* rehearing. (Pet. App. 54).

Petitioners ask this Court to review and correct the Federal Circuit's determination of when a Trails Act taking occurs, a determination that affects timeliness, standing and compensation in every Trails Act taking case brought against the United States. Not only is the Federal Circuit's opinion binding precedent for all Trails Act cases, it has implications for determining the timeliness of any

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has been taken. *Black's Law Dictionary* 1345 (8th ed. 2004). However, it is used in this Petition only as shorthand for describing the result of the easement being abandoned for railroad purposes – the previously burdened land "reverts" to the full, unburdened possession of the landowner. Thus, as used here, it is a present interest in land. *See Preseault v. United States [Preseault II]*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*en banc*).

[3] The STB (previously the Interstate Commerce Commission, or "ICC") is an executive agency with plenary authority to regulate the operation of railroads; its approval is required in order for a railroad to abandon its rail lines. *NARPO v. STB*, 158 F.3d 135, 137 (D.C. Cir. 1998). Although the proceedings in this case began before the STB succeeded the ICC, to avoid confusion, the Petition will refer only to the STB.

taking claim that arises when government regulation precedes a physical taking.

A. Statutory Framework

In an effort to preserve rail corridors, Congress passed the Trails Act, 16 U.S.C. § 1241 *et seq.*, which requires that, before a railroad can consummate a government-approved abandonment of its rail line, interested and qualified agencies must have the opportunity to negotiate with the railroad to acquire possession of the rail segment and operate it as a public recreational trail, on the condition that the corridor might be returned to railroad use at some point in the future. 16 U.S.C. § 1247(d) (Pet. App. 60); *see Preseault v. ICC [Preseault I]*, 494 U.S. 1, 5-6 (1990). This process is called "railbanking," because, in theory, it places the rail line in a national "rail bank" to be "withdrawn" for use when it becomes appropriate and economically feasible.

The difficulty with this approach is that, under the law of many states, when an easement granted for a limited purpose is no longer used for that purpose, the easement is deemed abandoned, *Preseault I*, 494 U.S. at 8-9, 16, and the owner of the underlying land is once again entitled to use it as he pleases – which defeats the conversion to trail use. Thus, the Trails Act provides that, in the event the rail line is converted to trail use, "such interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Pet. App. 60). This interference with normal state property law principles, which would otherwise require the property to revert to the landowner upon the railroad's abandonment, is what gives rise to the taking alleged in this case. *Preseault I*, 494 U.S. at 8-9.

A railroad may opt to begin the STB process for abandoning a portion of its railroad line by requesting either an application for abandonment or an exemption

from the abandonment proceedings,[4] either of which trigger the Trails Act procedure. A party interested in taking over as "interim trail manager" may then request that the STB issue either a Certificate of Interim Trail Use or Abandonment ("CITU") (in the case of application for abandonment) or, as is applicable here, a Notice of Interim Trail Use or Abandonment ("NITU") (in the case of a request for exemption). The prospective trail manager must certify that it is willing to assume financial, legal and management responsibility for the trail and to acknowledge that the rail easement's use as a trail is subject to "possible future reconstruction and reactivation of the right-of-way for rail service." 49 C.F.R. § 1152.29(a)(3) (Pet. App. 67). The railroad must notify the STB that it is willing to negotiate with the prospective trail manager for trail use. 49 C.F.R. § 1152.29(d) (Pet. App. 68).

If these conditions are fulfilled, the STB then issues the CITU/NITU, which authorizes a 180-day period for negotiation between the railroad and the prospective trail manager, and temporarily stays the railroad's authorization to consummate abandonment of the rail line. 49 C.F.R. § 1152.29(d) (Pet. App. 68). The CITU/NITU is self-executing, in that it prospectively authorizes, but does not cause, either abandonment or trail use. Specifically, the CITU/NITU authorizes conversion to trail use if the parties' negotiations are successful and an "agreement for interim trail use/rail banking is reached" that requires "the trail user to assume for the right-of-way during the term of the agreement, full responsibility for its management, for any liability arising out of its transfer or use . . . and for payment of any taxes." *See, e.g.*, Pet. App. 73-74. If negotiations are unsuccessful, the CITU/NITU authorizes the railroad to proceed with consummating its abandonment. *See, e.g.*, Pet. App. 74.

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[4] *See* 49 U.S.C. § 10903 (Pet. App. 63) (abandonment); 49 U.S.C. § 10502 (Pet. App. 61) (exemption). The distinction between these two avenues of abandonment is not material to the issues raised here.

B. Factual Background

1. Notice of Exemption and Initiation of Negotiations Under NITU

The Warm Springs line is a 10.6 mile right-of-way made up of two segments of a rail line owned by Norfolk Southern Railway Corporation. In May 1994, Norfolk Southern published its intent to file a notice of exemption, which requested permission from the STB to abandon a 7.4 mile segment of the line. The STB allowed the exemption, effective August 25, 1994, pending any offers for financial assistance to continue rail service or to take over the line as a trail. A389.[6]

The City was interested in obtaining the Warm Springs line to create public walkways and bikeways. A373. It had already contacted Norfolk Southern about acquiring the 7.4 mile segment, *see, e.g., id.*, noting that the city was working with Trust for Public Land ("TPL"), a nonprofit corporation that acquires land on behalf of public bodies while those parties pursue public funding for the land. *Id.*; A375, A495. Thus, Norfolk Southern notified the STB of its willingness to negotiate a trail use agreement and its consent to the issuance of an NITU, and the City notified the STB that it was willing to assume financial and legal responsibility for the segment if the City were to take over as a trail manager, and requested that an NITU issue. A393. The STB issued the NITU on August 31, 1994, which started a 180-day negotiating period, running through February 27, 1995. (Pet. App. 72-74).

On February 23, 1995, the City and Norfolk Southern jointly requested to add another 3.2 mile segment to the 7.4 mile segment already covered by the NITU. A399; *see* Pet. App. 75-76. The STB had previously approved the line for abandonment, but Norfolk Southern had not yet removed

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[6] References to "A___" are to the joint appendix in the Court of Appeals.

tracks or otherwise consummated abandonment; thus, effective June 2, 1995, the STB reopened the proceedings as to the 3.2 mile segment, consolidated them with the proceedings on the 7.4 mile segment, and extended the NITU negotiating period to August 26, 1995. (Pet. App. 76-77).

2. Purchase and Sale Agreement

Norfolk Southern and TPL entered into a purchase and sale agreement ("Purchase Agreement") for the full 10.6 mile segment on August 17, 1995, with the agreed purchase price of $1 million. A407-09. TPL paid $500 in earnest money, only $100 of which would be retained by Norfolk Southern in the event TPL decided not to close. A409-10. In the event that testing revealed environmental hazards or the title examination revealed defects, and Norfolk Southern failed to remedy those defects, TPL had the option of terminating the agreement and Norfolk Southern would be obligated to refund the entire $500 in earnest money. A413-14.

Under the terms of the Purchase Agreement, Norfolk Southern agreed to transfer title within one year of the execution of the contract, and to "deliver possession of the Property" to the buyer on the closing date, along with a quitclaim deed and an assignment of leases and other agreements. A415-16. In the meantime, Norfolk Southern bore responsibility to "maintain the Property in its present condition" and to pay taxes prorated through the date of the closing. A410-11. Norfolk Southern also retained the right to receive income, rents and payments, prorated through the date of closing. A416. The Purchase Agreement granted TPL the right to enter upon the land "for the purpose of inspecting, examining, surveying, [and] making . . . necessary tests," but TPL agreed to indemnify and hold Norfolk Southern harmless for damages or injury incurred in connection with such testing. A412-13.

An April 18, 1996 amendment to the contract more specifically recited that the parties had entered into the agreement with the intent that "said agreement and the

conveyance pursuant thereto" be governed by the Trails Act. This first amendment provided that "at closing Buyer, its successor or assignee, shall assume full responsibility for the management of the right of way, for any legal liability arising out of its transfer or use, and for any payment of taxes in accordance with the requirements of Section 8(d) [of the Trails Act]." A425.

The parties again amended the contract on July 1, 1996, to reflect Norfolk Southern's approval of TPL's anticipated assignment of the Purchase Agreement to the City.[6] A428. In this second amendment, the parties also added an agreement to jointly move for an extension of the NITU, and to extend the closing date to the earlier of 75 days after the STB's grant of the joint motion for extension or December 20, 1996. A429. TPL assigned the Purchase Agreement to the City on July 2, 1996. A404-06.

3. Completion of Negotiations and Closing

On July 5, 1996, and pursuant to the terms of the second amendment to the Purchase Agreement, the City and Norfolk Southern jointly moved the STB to "extend the time period for negotiation of a mutually acceptable interim trail use/railbanking agreement" through November 1, 1996. A440; *see* Pet. App. 79. The motion represented that "[a] railbanking agreement has been reached by the parties" but requested an extension of the NITU "in order to ensure that the railbanking period extends through the time of the actual transfer of the corridor to the interim trail manager . . . and to cover any gaps that may have inadvertently occurred in the railbanking negotiating period." A440-41; *see* Pet. App. 79. In particular, the parties had never requested an extension of the NITU negotiating

[6] At a regular meeting on October 24, 1995, Columbus City Council authorized title examination and environmental testing on the property. A431. The Council later met in an executive session on April 30, 1996, and approved proceeding with the purchase of the property. A434.

period past August 26, 1995. A442-43. The parties requested an extension to November 1, 1996, "the anticipated date for closing on the transaction." *Id.* In an order served August 6, 1996, the STB acknowledged that the extension was requested "to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager." Pet. App. 79. It found that it retained jurisdiction, and granted the extension. Pet. App. 79-80.

The parties consummated the transaction in October of 1996. On October 9, 1996, Norfolk Southern executed a quitclaim deed in favor of Columbus. A448. This deed was recorded on October 11, 1996, *id.*, and "[a]cquisition of the land and payment of related expenses was completed October 11, 1996," A434-35. On October 15, 1996, the City retroactively authorized its mayor to "execute and negotiate an agreement" with Norfolk Southern to pay the $1 million purchase price and to reimburse TPL's expenses in connection with the acquisition process. *Id.* On November 2, 1996, the City notified the STB that, as of October 13, 1996, the rail lines "have been transferred to the City of Columbus, as interim trail manager, pursuant to an interim trail use/railbanking agreement and the . . . NITU." A454. The STB entered the notice into the public record on November 5, 1996. *Id.* Conversion of the rail line to a trail pursuant to the Trails Act was now, finally, consummated.

4. Dismissal by the Court of Federal Claims

Because it is a claim arising under the Constitution, landowners may bring suit for just compensation for a federal taking under either the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 58), or the Little Tucker Act, 28 U.S.C. § 1346 (Pet. App. 57). *See Preseault I*, 494 U.S. at 14 (payments for Trails Act takings claims arise under the Fifth Amendment, not under the Trails Act). The Tucker Act provides jurisdiction in the Court of Federal Claims for all such claims, and the Little Tucker Act provides concurrent jurisdiction in district courts for claims not exceeding $10,000. (Pet. App. 58).

On October 7, 2002, less than six years after the Railroad executed the quitclaim deed, the Petitioners filed a Tucker Act suit in the Court of Federal Claims alleging that the conversion of the Warm Springs Line to trail use worked a taking of their reversion interest. The Government filed a motion to dismiss on the ground that the Petitioners had not filed within the six-year statute of limitations in 28 U.S.C. § 2501 (Pet. App. 59). Because the manner in which both courts below resolved the arguments raised demonstrates the need for this Court to decide the Questions Presented, both opinions bear describing in detail.

The Government argued in the Court of Federal Claims that the Petitioners' claims had accrued on one of two alternative dates: the dates the first NITUs for each segment issued (August 31, 1994 and June 2, 1995); or the date on which the Railroad and the City informed the STB they had "reached their interim trail use and railbanking agreement" (July 5, 1996). *Caldwell v. United States [Caldwell I]*, 57 Fed. Cl. 193, 197 (2003) (Pet. App. 72-79). The Government pointed out that the Federal Circuit, in *Preseault v. United States [Preseault II]*, 100 F.3d 1525 (Fed. Cir. 1996), stated that a taking claim would not be ripe "[u]ntil the [STB] makes the administrative decision to convert an unused right-of-way to a trail, rather than simply permit abandonment, and finds an appropriate public agency to operate the trail." *Id.* at 1538; *see Caldwell I*, 57 Fed. Cl. at 200 (Pet. App. 41). Thus, the Government relied most heavily on the date the NITU first issued as the date of accrual because it was the only "administrative decision" of the STB, and (because the NITU is self-executing) no further government action was required in order for the Petitioners' claims to accrue. *Id.* However, two unpublished Court of Federal Claims opinions had fixed the accrual date to be when the "railbanking/interim trail use agreement" was executed. *Id.* at 202 (Pet. App. 45-46); A327. Nevertheless, even under that view, the Petitioners' claims were not timely because the

Government contended the agreement was reached no later than July 5, 1996. *Caldwell I*, 57 Fed. Cl. at 196, 197.

The Petitioners contended that the earliest date their claims could have accrued was when the Railroad executed a quitclaim deed in favor of the City. Before that time, it was not known whether the rail line would become a trail, or would instead be abandoned by the Railroad. *See id.* at 197-98 (Pet. App. 35). The NITU was a necessary but not sufficient condition for trail use, and *Preseault II* did not fully answer the question of what ***was*** sufficient because, in that case, the rail line had been abandoned for ten years before any regulatory action on the line.[7] Further, the Purchase Agreement did not transfer any property interest, legal responsibility, or financial responsibility, and in fact expressly conditioned the transfer on closing. *See Caldwell I*, 57 Fed. Cl. at 197-98 (Pet. App. 35). Interim trail use was not consummated until possession of the rail easement had been transferred to the City for use as a trail. *See id.* Thus, any claim for the taking Petitioners alleged could not be ripe before the transaction was closed and the deed was executed and delivered.

The Court of Federal Claims noted that "the Government's liability is set when plaintiffs' property had been definitely converted to public use and the plaintiffs were able to bring a claim under the Tucker Act." *Id.* at 197 (Pet. App. 34). But the court identified the "Trail Use Agreement" – which it defined as the "railbanking agreement" to which the parties referred in the July 5, 1996 request for extension – as the precise point of claims accrual. *Id.* at 198-99 (Pet. App. 35, 40). The court stated that the plaintiffs were wrong to focus on the inchoate nature of the Purchase Agreement rather than discussing the "Trail Use Agreement" that ended

[7] The *Preseault* litigation predated the regulations now in effect. *Preseault I*, 494 U.S. at 7 n.5. *Preseault II* is discussed in more detail *infra*, at pp. 20-21.

the NITU negotiating period – but the court never explained the distinction it saw between the Purchase Agreement and the "Trail Use Agreement."[8] *Id.* at 198 (Pet. App. 35).

The Court of Federal Claims next rejected both the Petitioners' position that the conversion to trail use could not have occurred until after title passed to the City, and the Government's argument that the NITU triggered the Petitioners' claims. The Petitioners had relied on *United States v. Dow*, 357 U.S. 17 (1958), and *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984), for the proposition that, in formal condemnation cases, a taking does not occur until the earlier of when the Government takes possession of the land or legal title passes to the Government, and not when the condemnation proceeding is announced. 57 Fed. Cl. at 198 (Pet. App. 36-37). However, the court appeared to apply a regulatory taking analysis rather than a physical or *per se* taking analysis, as demonstrated by its discussion of *Dow* and *Kirby*:

> Even in the context of a condemnation proceeding, . . . the Supreme Court scrutinized first the ***severity of interference*** with plaintiff's property rights. Only then did the Court hold that the level of severity was met with the transfer of the deed. . . . The Court's holding in *Kirby* focuses . . . more on the ***Government's interference with plaintiff's rights***, and to that extent, the case is instructive.

Id. (emphasis added). In further support of its view that the title transfer was not the date the taking claim accrued, the court observed that interim trail use may occur by "donation, transfer, lease, sale, or otherwise," so it

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[8] Petitioners filed a motion for reconsideration asking the court to clarify the "Trail Use Agreement" to which it referred in its opinion, as well as to consider a tolling argument based on a nationwide class action of which the Petitioners learned only after the court's opinion issued. The court did not address the request for clarification, and rejected the Petitioners' tolling argument. (Pet. App. 51-53).

"would not make sense" for the claim accrual to be triggered by a deed when the Trails Act did not require a deed. *Id.* at 198-99 (Pet. App. 38).

On the other hand, the Court of Federal Claims noted, the Government's argument that the NITU was the date that Petitioners' taking claims accrued ignored a second requirement in *Preseault II*: that the STB "select an appropriate public agency to operate the trail," a requirement that "is met only after the parties successfully negotiate a Trail Use Agreement." *Id.* at 200 (Pet. App.41). The court acknowledged the Government's contention that the NITU triggered the statute of limitations because "the NITU is effective when issued to delay the vesting of any reversionary interests," *id.* at 202 (Pet. App. 46), so although "[t]he fate of their land rights was unknown" at that point, "at least temporarily, [Petitioners'] rights were suspended," *id.* at 201 (Pet. App. 43). Again resorting to a regulatory taking analysis, however, the court rejected the Government's argument: "The Federal Circuit in *Preseault [II]* did not look at the last government action, as defendant urges, but, rather, focused on the end of the administrative process, which the Government set into action with the NITU issuance, but which concluded with the execution of the Trail Use Agreement." *Id.* at 201 (Pet. App. 43-44). In further support of its view that an NITU did not work a taking, the Court of Federal Claims relied on *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994), a *per se* regulatory taking case, which held that a claim for a taking of all economically viable use of property did not accrue until the EPA issued a final order blocking the project, and not when the regulatory process began. *See Caldwell I*, 57 Fed. Cl. at 203 (Pet. App. 48-49). The Court of Federal Claims thus concluded that "issuance of the NITU does not determine the results of the Government's action in the case at bar. The taking becomes fixed only after the parties reach a Trail Use Agreement. Before that date the outcome of the Government action is not certain, so the taking has not been effected." *Id.*

The Petitioners timely appealed to the Federal Circuit.

5. Federal Circuit Affirmance

On appeal, the Government abandoned its argument that the NITU triggered the statute of limitations, settling instead on the date the parties had announced a "railbanking agreement has been reached." Appellee's Br. at 16-17. The Federal Circuit opinion correctly described the parties' arguments and positions on appeal. *Caldwell v. United States [Caldwell II]*, 391 F.3d 1226, 1228-33 (Fed. Cir. 2004) (Pet. App. 2-12). Nevertheless, the Federal Circuit rejected both parties' arguments and selected the NITU – for which neither party argued on appeal – as the date of accrual. *Id.* at 1233 (Pet. App. 12).

As they did in the Court of Federal Claims, Petitioners contended on appeal that "a taking under the Trails Act did not occur until the railroad line right-of-way was actually converted into a trail for interim trail use." *Caldwell II*, 391 F.3 at 1233 (Pet. App. 12); Appellants' Opening Br. at 34-36. At oral argument, a member of the panel stated that the taking did not actually occur when the rail line became a trail, but (as it was described by the same panel member in the opinion) "when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Caldwell II*, 391 F.3d at 1233 (Pet. App. 12). Counsel for Petitioners agreed with the court that the taking occurred when the state-law property interests were blocked, but stated that Petitioners' position was that this only occurred when the property was converted to trail use. *Cf.* 16 U.S.C. § 1247(d) (Pet. App. 60). ("[S]uch interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.")

In its written opinion, a majority of the panel disagreed with Petitioners' position. Following its observation noted above, the majority added that

> the question, then, is . . . when are state law reversion interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

391 F.3d at 1233 (Pet. App. 12).

Over the Petitioners' protestations, Appellants' Reply at 8-11, the Federal Circuit agreed with the Government's emphasis on the last "government action" as the only possible trigger. The Petitioners had contended that, in a case such as this where the federal government has authorized a third party to occupy land, it is the third party's occupation of the land, and not merely the government act authorizing it, that creates a taking. *Id.* at 9-10; *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Without addressing this argument, the Federal Circuit stated that not only was the "issuance of the NITU . . . the only *government* action in the rail-banking process that operates to prevent abandonment" but that "[t]he task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator." *Caldwell II*, 391 F.3d at 1233-34 (Pet. App. 13-14) (emphasis in original). Such private action, in the Federal Circuit's view, could not work a taking.

Additionally, the Federal Circuit majority rejected the Petitioners' argument that accrual could not be triggered by the NITU because an NITU could lead to either abandonment or trail use, depending on the outcome of negotiations. In fact, the court acknowledged that

> the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would

> then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Id. at 1234 (Pet. App. 14-15) (citations omitted). The Federal Circuit pointed to *United States v. Dow*, 357 U.S. 17 (1958) as support for the fact that a takings claim might first accrue – "there by physical possession, here by blocking the easement reversion" – and then be cut off, rendering it merely a temporary taking.[9] *Caldwell II*, 391 F.3d at 1235 (Pet. App. 16).

Given the Court of Federal Claims' application of regulatory takings principles, the Petitioners had made a point of arguing in their appellate briefs that a Trails Act taking was a physical, *per se* taking, and that it was important, under *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) to apply only physical taking precedents and accrual concepts to the case. Appellants' Opening Br. at 26-30; Reply at 2-5. Nowhere in the opinion did the majority state what kind of taking analysis it was applying. However, in support of its statement that it was not unusual for the temporary nature of a taking not to be apparent when it accrues, the Federal Circuit relied solely on three regulatory taking cases involving the denial of a permit. *Caldwell II*, 391 F.3d at 1234 n.8 (Pet. App. 15).

Judge Newman dissented, agreeing with the Petitioners' view of the taking as a physical taking triggered by the City's occupation and possession of the easement.

> Until the easement was transferred to the City of Columbus, Norfolk Southern Railroad not only continued as owner of the right-of-way, but retained all of

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[9] The Federal Circuit disclaimed any attempt to determine whether a compensable temporary taking would have occurred because this case involved a permanent taking. *Id.* at 1234 n.7 (Pet. App. 15).

> the benefits and obligations of ownership. . . . Until the right of trail use was vested in the City the cause of action had not ripened, and the liability of the government for compensation was not fixed.

Caldwell II, 391 F.3d at 1236 (Pet. App. 20). This was so because none of the conditions for trail use (the trail operator's assumption of legal and financial responsibility for the trail) could occur until the City took possession of the trail. *Id.* The NITU represented only a "hope and a plan" that the easement would be converted to a trail, and the Purchase Agreement made the assumption of the required responsibilities contingent on closing. *Id.* at 1237 (Pet. App. 21). Further, that agreement "documented its own negotiating status" when the provision was added July 1, 1996 providing that the parties would jointly request an extension of the negotiating period. *Id.* (Pet. App. 22). Only when, as in *Nollan*, "persons are given a permanent and continuous right to pass to and fro," had a taking claim accrued. *Id.* at 1238 (Pet. App. 22).

Judge Newman also pointed out that, far from supporting the majority's position, *Dow* supported the Petitioners. *Id.* (Pet. App. 23). *Dow* was not a statute of limitations case, but was about whether the plaintiff landowner had standing to obtain just compensation for property interests the Government acquired by eminent domain. *Id.*; *see Dow*, 357 U.S. at 23. The Government had already entered into possession, but had not yet deposited the compensation with the court, when the landowner purchased the property. *Caldwell II*, 391 F.3d at 1238 (Pet. App. 23); *Dow*, 357 U.S. at 19. The question was whether he was entitled to receive the purportedly assigned claim to compensation. *Caldwell II*, 391 F.3d at 1238 (Pet. App. 23). In fact, Judge Newman pointed out, "[t]he Court stressed that the determinative event of the taking was whether 'the Government has already entered into possession.'" *Id.* Thus, the majority's analogy to *Dow* was not apt, because in Petitioners' case, the NITU "did not change the possession and occupancy of the easement." *Id.* (Pet.

App. 24). Rather, "*Dow* strongly reinforces the position that the Norfolk Southern right-of-way was not taken and compensable until there was a transfer of possession and occupancy, an event that did not occur until the date of Closing and the transfer of the deed." *Id.* at 1239 (Pet. App. 24).

In light of Judge Newman's dissent and the importance of this issue, the Petitioners moved for rehearing *en banc* (Pet. App. 54). The court requested a response from the Government, but ultimately denied rehearing. (Pet. App. 54).

Notably, under 28 U.S.C. § 1295(a)(2) (Pet. App. 57), the Federal Circuit has ***exclusive jurisdiction*** over appeals in cases arising under the Constitution and brought under either the Tucker Act or the Little Tucker Act. Further, the respective statutes of limitations (28 U.S.C. § 2501 and 28 U.S.C. § 2401) use nearly identical language. (Pet. App. 59). Thus, the issues decided by the Federal Circuit in this case are binding on every court deciding a Trails Act taking case (and, indeed, on every takings case against the United States) in the country.

REASONS FOR GRANTING THE WRIT

The Federal Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and moreover, it has decided an important federal question in a way that conflicts with decisions of this Court.

Specifically, the Federal Circuit determined that a taking by operation of the Trails Act accrues when the STB merely issues the NITU that begins the negotiating period that ***might*** result in trail use, even though it is also possible that the negotiations will fail and the rail line will be abandoned, leaving the property interest to revert to the Petitioners. The Federal Circuit's holding applies not only to the 400 landowners in the class

proposed by Petitioners, but to every Trails Act claim now pending or brought in the future, across the United States. The holding infects every aspect of the litigation of Trails Act claims, and it threatens to wreak havoc on notions of ripeness and accrual in many other areas involving state or federal regulation. The Federal Circuit came to this erroneous conclusion by ignoring several fundamental principles that have been established in this Court's takings jurisprudence, and its decision should be corrected by this Court.

I. The Federal Circuit Has Decided an Important Question of Federal Law.

The rule announced in the Federal Circuit's opinion is an important question of federal law. There is no circuit split in this case because, as noted above, the Federal Circuit's decision governs every Trails Act takings case. But, for that same reason it is important that this Court grant certiorari to correct the Federal Circuit's erroneous decision.

This Court previously addressed the potential for a taking that could be worked by the Trails Act in *Preseault I*, but declined to decide whether a taking had occurred in that case. The Court quoted the House Report for the Act, which recognized the need to state that "interim [trail] use shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes" because "there may be nothing left for trail use" after abandonment has been consummated. *Preseault I*, 494 U.S. at 8 (quoting H.R. Rep. No. 98-28, at 8-9, *reprinted in* 1983 U.S.C.C.A.N. 112, 119-20). The Court noted that "by deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." *Id.* Thus, the unanimous Court acknowledged that, in some cases, the Trails Act may work a taking. *Id.* at 16. However, because the Preseaults had brought a facial challenge to the Trails Act rather than bringing suit for just compensation under the

Tucker Act, the Court declined to reach the question of whether a taking had occurred in that case. *Id.* at 17.

Justice O'Connor's concurring opinion (for herself and Justices Scalia and Kennedy) wrote to express the view "that state law determines what property interest petitioners possess, and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess." *Id.* at 20. The Second Circuit's decision in the case had determined that no taking could occur as a matter of law because the petitioners' interests could not vest until the ICC determined abandonment was appropriate – which would never occur if the rail line were converted to a trail. *See id.* at 23. Justice O'Connor noted that the Court's opinion was "inconsistent with the Second Circuit's view," and was correct because the ICC's jurisdiction to regulate did not preempt the state property law principles with which the ICC's actions may interfere. *Id.* at 24. Rather, if ICC action interferes with state property law interests, just compensation is required. *Id.* As to the question of ***whether*** a taking had occurred, Justice O'Connor noted that "well-established principles will govern the analysis of whether the burden the ICC's actions impose upon state-defined property interests amounts to a compensable taking." *Id.* In particular, Justice O'Connor pointed to *Nollan*, where "the Government appropriated a public easement," as a likely basis for such a determination.

Following *Preseault I*, the Preseaults brought suit in the Court of Federal Claims, lost on the issue of whether there had been a taking, and appealed to the Federal Circuit. *Preseault II*, 100 F.3d at 1530. Reversing a panel decision, a majority[10] of the *en banc* Federal Circuit in

[10] Although the Government has persisted in referring to the decision as a plurality, the Federal Circuit has held that the holding of *Preseault II* "reflects the considered view of a substantial majority of

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Preseault II, guided by language in this Court's *Preseault I* opinion, including Justice O'Connor's concurrence, determined that, under Vermont law, a taking had occurred in that case. Because the railroad had, as a matter of fact, abandoned the rail line and leased it to the local government without seeking ICC approval, that case did not arise under the procedure at issue here, but rather as a result of the landowners filing a request with the ICC to certify abandonment. *Id.* at 1549. Thus, the majority found a taking occurred under either of two alternative theories: (1) if the rail easement still existed when the ICC Order issued, "[t]he taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use" because the change in use effected an abandonment under state law; or (2) "as an alternative basis," when the ICC issued its Order, "there was as a matter of state law no railroad easement in existence on those parcels" due to the prior abandonment, "and the properties were held by the Preseaults in fee simple" when they were taken for trail use. 100 F.3d at 1550. Either way, the majority viewed the taking as a

> physical entry upon the private lands of the Preseaults, . . . under the Federal Government's authority pursuant to the ICC's order. That it was for a valued public use was not the issue. We have here a straightforward taking of private property for a public use for which just compensation must be paid.

Id. at 1551.

The overarching question that was not directly answered by either *Preseault I* or *Preseault II* is the one presented squarely by this case and incorrectly decided by the Federal Circuit: Where a regulatory body authorizes a physical appropriation of a public easement upon the

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the court." *Toews v. United States*, 376 F.3d 1371, 1380 n.6 (Fed. Cir. 2004).

fulfillment of certain conditions, is it a regulatory taking that accrues upon the issuance of the regulatory action, or is it the same *per se* physical taking that the Federal Circuit found in *Preseault II,* and that this Court found in *Nollan*? This question does not merely affect the determination of when these petitioners' claims accrued, but determines important questions throughout the Trails Act taking litigation, and it implicates takings under similar regulatory schemes.

Most immediately, the Federal Circuit's decision determines whether these 400 landowners, and others similarly situated, *see Barclay v. United States*, 351 F. Supp. 2d 1169 (D. Kan. 2004), will even have access to a determination of the just compensation to which they are entitled under the Constitution. As of June 15, 2005, 155 NITUs had been issued in the previous six years. Fifteen of those were issued in the previous 180 days, and an additional thirty-five were issued earlier but have been extended for additional time, for a total of fifty cases in which the trail use negotiating period is still open. Each case on the STB docket can affect hundreds of landowners who own property burdened by the rail line. Those landowners who, like the Petitioners, relied on the date the trail operator took possession as the final accrual date for their claims may now find that their claims are barred because they accrued at the much earlier (and more obscure) time – the date an NITU issued.

Even as to those landowners whose claims are not already prematurely barred under the Federal Circuit's decision, other important questions that arise in Trails Act cases are also determined by the Federal Circuit's opinion. This decision determines who has standing to assert takings claims (and in particular, the definition of classes of landowners). *Dow*, 357 U.S. 20 (noting that one may only sue for a taking if the owner at the time of the taking). It also affects the determination of the landowners' compensation. *Kirby*, 467 U.S. 10 (holding that compensation is determined as of the time of taking). If, as the

Federal Circuit held, the taking occurred when the NITU issued, and not when the rail line was actually converted to trail use (which is often years later, due to extensions), classes of landowners are likely to be improperly defined, and the value of the land may have changed significantly between the date when the railroad first decided to abandon the land and when the trail operator took over possession – particularly if the public becomes aware of the change in use of the easement during that time.

The Federal Circuit's ruling that the statute of limitations accrued when the NITU issued necessarily means that Trails Act taking claims are also ***ripe*** as soon as the NITU issues. According to the Federal Circuit's decision, all fifty NITU negotiating periods that were still open on June 15, 2005 – *i.e.* that had not yet resulted in trail use – nonetheless presented ***ripe taking claims*** as of that date. This result should trouble the Government, and also presents a dilemma for the courts, who are left to deal with evaluating claims for takings when it is not yet known whether they are permanent, and whether they are compensable at all under a *Penn Central* analysis. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Finally, to the extent that the Federal Circuit's holding can be analogized to takings occurring as a result of other regulatory actions outside the Trails Act taking context, it threatens to wreak havoc with notions of ripeness and accrual in this broader arena.

II. The Federal Circuit Has Decided This Question in a Way That Directly Conflicts With Prior Decisions of This Court.

It is even more important for this Court to grant certiorari and decide this question of federal law because the Federal Circuit's decision conflicts with this Court's takings precedents. Specifically, it fails to recognize that the taking of an easement in land for the use of the public is a *per se*, physical taking as in *Nollan*, *see* 483 U.S. at 831-32, 841, regardless of whether that taking is preceded

by some regulatory action. In *United States v. Clarke*, 445 U.S. 253 (1980), and *Dow v. United States*, this Court stated that a claim for compensation for a physical invasion of land accrues when the land is actually invaded. Here, under the reasoning in *Preseault I* and the language of the Trails Act, no such invasion could have occurred until the City took possession.

Further, the Federal Circuit misinterpreted *Dow* to say that it did not make a difference whether a taking would be permanent or temporary in determining the time of accrual of a Trails Act taking. In fact, if the NITU works a temporary taking, this Court's recent *Tahoe* decision, 535 U.S. 302 (2002), requires that it be subject to a *Penn Central* ad-hoc analysis, and that is dependent, in large part, on whether the taking is permanent or temporary. Thus, based on basic and longstanding accrual principles, it cannot be the rule that a taking claim for a physical taking accrues at the time of an earlier (and conditional) regulatory authorization for that taking.

A. The Federal Circuit Erred in Failing to Analyze This Taking As a Permanent Physical Occupation.

The Federal Circuit erroneously determined that a taking claim founded upon an appropriation of an easement in land is ripe when the NITU issues because it is the last "government action" preceding the appropriation. In doing so, it improperly applied concepts and precedents relevant to regulatory takings to this *per se* physical taking of an easement in land.[11]

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[11] In *Lingle v. Chevron*, ___ U.S. ___, 125 S.Ct. 2074 (2005), this Court revisited the types of takings that may occur under the Constitution, presenting a more nuanced view of the distinctions between them than seen in previous cases. Rather than draw the line between "physical" or "*per se*" and "regulatory" takings, the Court distinguished between direct appropriation by the government, "regulatory action"

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In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that requiring a beachfront landowner to allow a public easement for passage to a nearby beach as a condition for obtaining a building permit, when the need for such an easement was not caused by the building, worked a compensable taking.

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. . . .

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that was tantamount to direct appropriation, and all other kinds of regulation. *Id.* at 2081. The Court identified both the *Loretto/Nollan* paradigm (government-authorized appropriation by a third party) and the *Lucas* paradigm (taking of all economically viable use; *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)) as being in the second category of "regulatory action," while the third category of takings included those to which the *Penn Central* balancing test applied. *Id.*; *cf. Tahoe*, 535 U.S. at 323 (drawing the primary distinction between "acquisitions of property for public use," including *Loretto*, and "regulations prohibiting private uses," referring to *Lucas* as a "regulatory taking" that was an exception to the application of the *Penn Central* test). The Petitioners read *Lingle* and *Tahoe* together to describe a group of "categorical" or "*per se*" takings, which may either be a "positive taking," in the sense of a physical acquisition (or imposition of a burden) for public use, or a "negative taking" in the sense of being regulation prohibiting a private use. Thus, to be precise, this case presents a categorical, physical (or "positive") taking. This Court may find occasion to further describe these categories of takings if it grants certiorari in this case.

Regardless of the labels applied, the underlying legal principles are the same – the *Penn Central*-related questions of finality of administrative action, reasonable investment-backed expectations of the landowners, and the importance of the public benefit – are not relevant when the taking in question results in the appropriation of land for public use. *Lingle*, 125 U.S. at 2081-82. It is in this sense that Petitioners use the term "physical taking," even though the physical occupation may have come about as a result of regulatory action rather than a direct government appropriation. *See Tahoe*, 535 U.S. at 322 (referring to the *Loretto* case as a physical appropriation for a public purpose).

> In *Loretto*, we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." ***We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro***, so that the real property may continuously be traversed . . ..

Id. at 831-32 (emphasis added) (citations omitted).

The nature of the property interest taken in this case, and the manner in which it is taken for public use, is no different from the property interest that this Court had "no doubt" was a taking in *Nollan*. Regardless of the nature of the regulatory proceedings that bring it about, in the end, an easement in land is taken for public use when someone other than the owner of the underlying fee takes possession of or occupies it for public purposes. This is simply a physical, *per se* taking authorized by the Government, regardless of what regulatory action may have preceded it.[12]

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[12] Whether a taking in fact has occurred will depend on an analysis of state property law, but that analysis is only necessary to determine "the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and . . . the extent that the federal action burdened that interest." *Preseault I*, at 24 (O'Connor, J., concurring). That is, reference to state property law is necessary to determine the nature of the property interest held by the railroad and the extent to which the shift in use from railroad to recreational trail would normally result in the easement being extinguished for misuse – questions which will be addressed in determining liability. However, because a physical taking is alleged, the point at which such a taking would occur, if at all, is no earlier than when someone other than either the railroad or the landowner was in possession. Because the Petitioners' claims would be timely if they accrued at any point after the

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Liability for a physical taking accrues when physical occupation occurs. In *United States v. Clarke*, 445 U.S. 223 (1980), this Court evaluated whether Indian lands could be taken by inverse condemnation as opposed to formal condemnation proceedings. This Court quoted *Dow* on the issue of when claims accrue in cases involving physical occupation:

> In a [formal] condemnation proceeding, the taking generally occurs sometime during the course of the proceeding. . . . When a taking occurs by physical invasion, on the other hand, the usual rule is that ***the time of the invasion constitutes the act of taking***, and "[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued."

Id. at 258 (emphasis added).

Specifically in the Trails Act case, the physical occupation occurs upon conversion to trail use. The reasoning of *Preseault I* suggests that a taking, if any, accrues when the Trails Act prevents property interests from reverting under state law. *Id.* at 8-9. The statute states, "in the case of interim use of . . . railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, . . . ***such interim use*** shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Pet. App. 60). Thus, in this case, and consistent with the basic analysis of accrual of physical takings set out in *Clarke*, the taking accrued when, pursuant to a sale of the easement to the City as trail operator consistent with the Trails Act, the City took possession of the land.

Because this is a physical taking, and liability accrues when the third party occupies or enters into possession of the land, the timing of the last "government action"

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transfer to the City, determining the precise point of accrual in this case does not require reference to state abandonment law.

preceding the physical appropriation is irrelevant. In fact, in this case, the NITU did not even authorize the City (or the public) to enter the land until certain conditions regarding the City's responsibility for the easement were fulfilled. Those conditions were not fulfilled until closing, and the Federal Circuit was wrong to find otherwise.

B. The Federal Circuit Erred in Finding Petitioners' Claims Accrued as the Result of "Delay" in the Abandonment Process.

The Federal Circuit also erroneously determined that liability for a taking pursuant to the Trails Act was "fixed" when the STB imposed the NITU negotiation period prior to allowing the railroad to abandon its easement, because this mere delay in the abandonment process, the court held, "blocked" the reversion of the property interest to Petitioners.

The Federal Circuit, having decided that the NITU worked a taking, defended this position against Petitioners' (and the dissent's) argument that the NITU did not necessarily result in trail use by relying on an incorrect view of this Court's decision in *Dow*. *Caldwell II*, 391 F.3d at 1234-35 (Pet. App. 15-16). The Federal Circuit erroneously interpreted *Dow* to mean that it did not make a difference to the question of the Government's liability for a taking whether the taking was temporary or permanent – and thus it was irrelevant to the question of liability for a taking whether the conversion to trail use might be unsuccessful. *Id.*

But in *Dow*, liability for a physical taking had already been established because the Government had already entered into possession, 357 U.S. at 22; thus, as noted by Judge Newman, *Dow* was not a ripeness or accrual case. *Caldwell II*, 391 F.3d at 1238 (Pet. App. 23). The Court first reiterated the longstanding rule that "fixes the 'taking' ***at the time of the entry into physical possession***." *Dow*, 357 U.S. at 25. Then, in defending this rule

against the petitioner's claim that such a rule would prejudice the landowner in the event the Government abandoned the condemnation proceeding, the Court observed that, in that case, the physical taking would merely be a compensable temporary taking rather than a permanent one; it would not completely eliminate the landowner's ability to seek compensation. *Id.* at 26. This is a far cry from saying that a prior ***regulatory*** authorization can trigger the accrual for a subsequent ***physical*** taking.

And yet, the only plausible way in which a taking could be worked by the NITU, as the Federal Circuit erroneously concluded, is if it works a regulatory taking, by "delaying" the potential abandonment and requiring the railroad first to negotiate. *Tahoe* teaches that there is no such thing as a categorical (or *per se*) temporary regulatory taking; all temporary regulatory takings are subject to the *Penn Central* ad-hoc inquiry, as well as the finality rule for ripeness. 535 U.S. at 331, 339. "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe*, *id.* at 332. Rather, analysis of liability for such a taking requires "a more fact-specific inquiry," including evaluation of the extent of interference with (including delay of) the landowner's investment-backed expectations, and ripeness is subject to a strict administrative finality rule. *Id.* at 332, 336, 340-41. Thus, if the NITU is the accrual trigger, liability questions are ***highly dependent*** on whether the NITU has permanent or temporary effect. Moreover, to hold that a "delay" in a regulatory process can cause a takings claim to accrue runs afoul of this Court's oft-repeated concern that "***normal delays*** in obtaining building permits, changes in zoning, variances, and the like" should not give rise to a taking. *Id.* at 335; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

Accrual (and ripeness) depend on the extent to which the elements of liability for an injury are fixed, enabling

the plaintiff to file suit. *Dunlap v. United States*, 173 U.S. 65, 70 (1899). A claim cannot accrue before it has become ripe. *See id.* In *Dow*, there had already been a physical appropriation of land, so the elements of liability were fixed for the taking alleged; the question of whether the taking was temporary or permanent only implicated compensation, and not when the claim for compensation was ripe or had accrued. Here, the taking alleged is that, like in *Nollan*, upon the transfer of the deed from the railroad to the City, "individuals [were] given a permanent and continuous right to pass to and fro." *Nollan*, 483 U.S. at 832. The elements of liability for ***that*** taking were only fixed when the public had the right to invade the Petitioners' land. Whether the NITU might ***also*** work some kind of taking is questionable, but in any event is irrelevant to determining when Petitioners' claims had accrued. Even assuming the NITU works a taking, such a taking would necessarily be subject to the *Penn Central* analysis, so the fixing of the Government's liability is necessarily dependent on whether the taking will be temporary or permanent – and this can only be known when (and if) the NITU expires and the railroad abandons the rail line.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case to resolve this important issue of federal law, and decide that Petitioners' taking claims are timely.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

03-5152

WILLIAM B. CALDWELL, III and
BEN FRANK BILLINGS, III
(for themselves and as representative of
a class of similarly situated persons),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

(Filed December 14, 2004)

Jeffrey O. Bramlett, Bondurant, Mixson & Elmore, LLP, of Atlanta, Georgia, argued for plaintiffs-appellants. With him on the brief were *Benjamin E. Fox* and *Sarah Shalf*. Of counsel on the brief was *James P. Kelly*, Kelly Law Firm, P.C., of Atlanta, Georgia.

Kathryn E. Kovacs, Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued defendant-appellee. With her on the brief were *Thomas L. Sansonetti*, Assistant Attorney General; *John Smeltzer*, Attorney, of Washington, DC; and *Kristine S. Tardiff*, Trial Attorney, General Litigation Section, of Concord, New Hampshire. Of counsel on brief was *Evelyn Kitay*, Office of the General Counsel, Surface Transportation Board, of Washington, DC.

Appealed from: United States Court of Federal Claims
Judge Christine O.C. Miller

Before NEWMAN, DYK, and PROST, Circuit Judges.

DYK, Circuit Judge.

Appellants William B. Caldwell, III and Ben Frank Billings, III (collectively "Caldwell") brought a class action lawsuit seeking compensation for an alleged taking pursuant to the National Trail Systems Act (the "Trails Act"), 16 U.S.C. § 1247(d). The Court of Federal Claims held that the appellants' claim was barred under the applicable statute of limitations, 28 U.S.C. § 2501, because it accrued more than six years before the lawsuit was filed. *Caldwell v. United States,* 57 Fed. Cl. 193 (2003). Because the appellants' claim accrued when the exemption proceedings were halted by the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"), we affirm.

BACKGROUND

I

We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use. *Preseault v. United States,* 100 F.3d 1525, 1543 (Fed.Cir.1996) (*en banc*) ("*Preseault II*"); *see also Toews v. United States,* 376 F.3d 1371, 1376 (Fed.Cir.2004). This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the Tucker Act. 28 U.S.C. § 2501 (2000). The following is a brief summary of the Trails Act, which is described in some detail in *Preseault v. Interstate Commerce Commission,* 494 U.S. 1, 7-8, 110 S.Ct. 914, 108 L.Ed.2d 1 (1989) ("*Preseault I*"), the case in which the Supreme Court upheld the constitutionality of the Act under the Commerce Clause.

The Surface Transportation Board (the "STB" or "Board")[1] has authority to regulate the construction, operation, and abandonment of most railroad lines in the United States. A railroad seeking to abandon a railroad right-of-way within the jurisdiction of the STB must either: (1) file a standard abandonment application that meets the requirements of 49 U.S.C. § 10903; or (2) seek an exemption, under 49 U.S.C. § 10502.[2] If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect. *See Preseault I,* 494 U.S. at 6-8, 110 S.Ct. 914.

The Trails Act, through a process known as "railbanking," provides an alternative to abandoning a railroad right-of-way under sections 10903 and 10502. Section 8(d) of the Trails Act allows a railroad to negotiate with a state,

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[1] The Surface Transportation Board is the successor agency to the Interstate Commerce Commission and assumed control on January 1, 1996. 49 U.S.C. § 702 (2000). We use "STB" to refer to both agencies.

[2] Authorization of abandonment pursuant to the exemption procedures of section 10502 is less involved than the standard abandonment proceedings detailed in section 10903 and can be invoked under the statute when it:

> (1) is not necessary to carry out the transportation policy of section 10101 of [Title 49]; and
>
> (2) either (A) the transaction or service is of limited scope; or (B) the [full abandonment proceedings are] not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a) (2000). In practice, exemption proceedings are appropriate if no local traffic has run on the line in at least two years. *See Nat'l Ass'n of Reversionary Prop. Owners ("NARPO") v. STB,* 158 F.3d 135, 138 n. 4 (D.C.Cir.1998).

municipality, or private group (the "trail operator") to assume financial and managerial responsibility for operating the railroad right-of-way as a recreational trail.[3] *Id.* at 6-7, 110 S.Ct. 914. If the railroad and the trail operator indicate willingness to negotiate a trail use agreement, the STB stays the abandonment process and issues a notice allowing the railroad right-of-way to be "railbanked." 49 C.F.R. § 1121.4. The effect of the notice, if the railroad and prospective trail operator reach an agreement, is that the STB retains jurisdiction for possible future railroad use and the abandonment of the corridor is blocked "even

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[3] Section 8(d), codified at 16 U.S.C. § 1247(d), provides:

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

though the conditions for abandonment are otherwise met." *NARPO,* 158 F.3d at 139; *see also Preseault I,* 494 U.S. at 8, 110 S.Ct. 914. Specifically, section 8(d) provides that "such interim use [for trails] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Thus, section 8(d) of the Trails Act prevents the operation of state laws that would otherwise come into effect upon abandonment – property laws that would "result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners." *Rail Abandonments – Use of Rights-of-Way as Trails,* Ex Parte No. 274 (Sub-No. 13), 2 I.C.C.2d 591, 1986 WL 68617 (1986). A Fifth Amendment taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail. *See Preseault II,* 100 F.3d at 1552; *see also Toews,* 376 F.3d at 1376.

The statute does not specify in detail what procedures are to be followed under the Act. Pursuant to implementing regulations promulgated by the STB (and developed pursuant to notice and comment rulemaking), the typical railbanking process begins when a rail carrier files an abandonment application or, as in this case, a request for an exemption. 49 U.S.C. §§ 10903, 10502; *see also NARPO,* 158 F.3d at 138.

If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register. 49 C.F.R. § 1121.4(b) (2004). A potential trail operator may then file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a). Under section 1152.29(a) the petition must include: (1) a map of the right-of-way, (2) a statement indicating that the trail operator will assume financial and

legal liability for the right-of-way, and (3) an acknowledgement that the right-of-way may be reactivated for railroad use in the future.[4] If the railbanking petition meets these criteria, and the railroad agrees to negotiate with the petitioner and so communicates to the STB within ten days of the filing of the trail use petition, the STB will issue a Notice of Interim Trail Use or Abandonment ("NITU"). 49 C.F.R. §§ 1152.29(b)(2) and (d). This NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment, "consistent with interim trail use and rail banking" without consummating an abandonment and the NITU extends indefinitely to permit interim trail use once an "agreement" is reached between the railroad and the trail operator. 49 C.F.R. § 1152.29(d)(1).

In some cases, such as that of the recreational trail at issue in *Preseault II,* an interim trail use agreement may in fact be reached prior to the issuance of the NITU. 100 F.3d at 1549-50. In other cases, however, such as the present case, the NITU is issued after the trail operator

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[4] Specifically the regulation states that:

> The . . . petition must include:
>
> (1) A map depicting, and an accurate description of, the right-of-way . . . proposed to be acquired or used;
>
> (2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way . . . and for the payment of all taxes assessed against the right-of-way; and
>
> (3) An acknowledgement that interim trail use is subject to the user's continuing to meet its responsibilities . . . , and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

49 C.F.R. § 1152.29(a) (2004).

and the railroad indicate their intention to negotiate an agreement but prior to the finalization of an agreement.

Only one NITU is issued once the parties indicate their intent to negotiate for conversion of the corridor to trail use. If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator's fulfillment of its agreed-upon obligations. The STB retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked. *Preseault I*, 494 U.S. at 8, 110 S.Ct. 914. An "escape-clause" is also provided by the NITU such that if no agreement is reached within 180 days, the NITU "automatically converts into an effective . . . notice of abandonment," *id.* at 7 n. 5, 110 S.Ct. 914, which permits the rail carrier to "abandon the line entirely and liquidate its interest." *Id.* at 7, 110 S.Ct. 914; *see also* 49 C.F.R. § 1152.29(d)(1). The regulations also allow the parties to request an extension of the negotiating period if more time is necessary to reach a trail use agreement. 49 C.F.R. § 1152.29(e)(1).[5]

II

On July 5, 1994, the railroad in this case, Norfolk Southern Railway Company ("Norfolk"), filed a request for an exemption under 49 U.S.C. § 10505 (now § 10502) to abandon 7.4 miles of its railroad line located in Columbus, Georgia. Norfolk did not own this right-of-way in fee

[5] "The NITU . . . also provide[s] that, if the user [later] intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date." 49 C.F.R. § 1152.29(d)(2).

simple. Rather, Norfolk owned a railroad right-of-way easement that burdened larger parcels over which the line ran. On July 26, 1994, the STB published a notice of abandonment stating that – absent the filing of a petition to stay, *e.g.*, a railbanking petition – the exemption would become effective August 25, 1994. The city of Columbus, Georgia ("the City") filed a railbanking petition and requested issuance of an NITU on August 15, 1994. After receiving notice from Norfolk indicating the rail carrier's willingness to negotiate a trail use agreement with the City, the STB issued an NITU on August 31, 1994. Before the expiration of the 180-day negotiating period, the City and Norfolk filed a "Joint Motion for an extension of the negotiation period provided in the [NITU]" by an additional 180 days. (J.A. at 399.) The City and Norfolk also requested that the NITU be extended to cover an additional 3.2 miles of railroad line adjacent to the 7.4 miles covered by the original NITU.[6] On June 2, 1995, the STB granted both requests. As a result, the proceedings involving the 3.2-mile segment were consolidated with those involving the original 7.4-mile segment, and the NITU negotiating period was extended to August 26, 1995.

On August 17, 1995, Norfolk entered into a purchase and sale agreement ("the purchase agreement") with the

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[6] Norfolk had already obtained permission in a separate proceeding to abandon the 3.2 mile segment, but had "not removed the tracks or taken any other action to consummate the abandonment." (J.A. at 402.) The decision in this prior proceeding was vacated and the abandonment application for the 3.2 mile segment reopened pursuant to 49 C.F.R. § 1152.29(e)(1), which provides: "[I]f abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate . . . NITU will be issued."

Trust for Public Land ("the TPL"), the entity chosen by the City to negotiate the railbanking arrangement. Under the purchase agreement, Norfolk agreed to sell its railroad line right-of-way easement to the TPL for $1,000,000. Payment of the $1,000,000 (less $500 in earnest money) was to occur at a later date along with transfer of title to the right-of-way. The purchase agreement did not set a closing date, but provided that closing would "occur at a mutually agreeable time and location within three hundred sixty five (365) days." (J.A. at 415.) However, the purchase agreement also gave the TPL the right to terminate the purchase agreement "without liability for damages or for an action for Specific Performance, at any time prior to the Closing Date upon five (5) days written notice to [Norfolk]." (J.A. at 420.)

The purchase agreement was amended on April 18, 1996, to make clear that the conveyance was governed by section 8(d) of the Trails Act. On July 1, 1996, a second amendment was made to indicate the TPL's intent to assign its rights under the purchase agreement to the City. The second amendment also required the TPL and Norfolk to cooperate with the City to file a joint motion to further extend the NITU deadline. The following day the TPL assigned its rights under the purchase agreement to the City.

On July 5, 1996, the City informed the STB that a "railbanking agreement" had been reached, but requested that the NITU deadline be further extended "through the time of the actual transfer of the corridor to the interim trail manager, which [was] anticipated to occur on or before November 1, 1996, and to cover any gaps that may have inadvertently occurred in the railbanking negotiation period." (J.A. at 441-42.) On August 6, 1996, the STB

granted the City's motion for an extension "to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager," finding the "extension of the NITU negotiating period [to be] warranted" and that "[a]s long as an abandonment has not been consummated and the railroad agrees to negotiate, the Board's jurisdiction is not terminated." (J.A. at 446.) Norfolk transferred its easement for the 10.6 mile railroad line right-of-way by quitclaim deed on October 9, 1996. The deed was recorded on October 11, 1996.

On November 2, 1996, the City filed a "Notification of Railbanking/Interim Trail Use Agreement" to "formally notify the [STB] that, on October 13, 1996, the railroad lines [were] transferred to the City of Columbus as interim trail manager pursuant to an interim trail use/railbanking agreement." (J.A. at 454.) The notification further stated that "[a]s a result of the successful completion of this railbanking/interim trail use transaction, the NITU should now extend indefinitely." *Id.* This notice was entered into the STB record on November 5, 1996.

III

The appellants, Caldwell, own land that was burdened by the easement Norfolk owned for the 10.6 mile railroad line right-of-way that was the subject of NITU and the railbanking agreement. On October 7, 2002, Caldwell filed a complaint in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, on behalf of themselves and the class of people who also owned land burdened by the railbanked easement. Caldwell alleged that the government's conversion of the 10.6 mile railroad right-of-way to trail use constituted a compensable taking because the

conversion extinguished state law reversionary property interests that would otherwise take effect following the cessation of railroad activities and subsequent abandonment of the easement for railroad use of the right-of-way.

On June 30, 2003, the Court of Federal Claims granted the government's motion to dismiss the complaint because the six-year statute of limitations under 28 U.S.C. § 2501 had run. *Caldwell*, 57 Fed.Cl. at 204. The court rejected Caldwell's argument that its takings claim accrued within the limitations period, when the right-of-way deed was transferred from Norfolk to the City on October 9, 1996. *Id.* at 197-99. The Court of Federal Claims also rejected the government's position that the statute began to run upon issuance of the NITU, concluding that the filing of a claim after the issuance of the NITU but before the identification of "an appropriate public agency to operate the trail" would be premature, relying on language in our *Preseault II* opinion. *Id.* at 200 (citing *Preseault II*, 100 F.3d at 1538). Instead, the Court of Federal Claims held that "the Government taking is fixed upon the signing of the Trail Use Agreement. At that time the provisions of the NITU become permanent, depriving plaintiffs of their rights in the land in question." *Id.* at 203. Thus, the court held that Caldwell's takings claim had to have accrued prior to July 5, 1996, the date the STB was informed that the purchase agreement had been reached. *Id.* at 203-04. Because Caldwell's claim was not filed until October 7, 2002, more than six years after July 5, 1996, the claim was barred by the statute of limitations. *Id.*

Caldwell filed a motion for reconsideration on July 15, 2003, arguing for the first time that a parallel class action, filed in a Kansas district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), tolled the statute of limitations on

Caldwell's claim. The Court of Federal Claims denied the motion for reconsideration on August 11, 2003. Caldwell timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the legal aspects of the determination by the Court of Federal Claims that the appellants' claim was barred by the statute of limitations without deference. *Applegate v. United States*, 25 F.3d 1579, 1581 (Fed.Cir.1994).

I

The appellants argue that the Court of Federal Claims erred by holding that their claim was barred by the statute of limitations. Specifically, Caldwell urges that a taking under the Trails Act did not occur until the railroad line right-of-way was actually converted into a trail for interim trail use on October 11, 1996. We disagree.

The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting. *Preseault II*, 100 F.3d at 1552; *see also Toews*, 376 F.3d at 1376. The question, then, is in the context of an exemption proceeding, when are state law reversion interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

In implementing the Trails Act, the STB chose to place the primary responsibility for creating railbanking arrangements on the railroad and trail operator. The Board has stated that in order "to promote and expedite the Trails Act process" it has "declined to burden the Trails Act process, unnecessarily either by rule or adjudication." *Policy Statement on Rails to Trails Conversions,* Ex Parte No. 274 (Sub-No. 13B), slip op. at 4 (I.C.C. Jan. 29, 1990). Indeed, in the STB's view, it "lack[s] discretion to deny or condition a trails use proposal (other than to ensure that the statutory qualifications are met)." *Id.* at 3. As a result, the NITU is issued only after both the railroad and the trail operator indicate their intent to negotiate a trail use agreement. The process begins when the railroad initiates the abandonment process (either through standard abandonment or exemption procedures). 49 C.F.R. § 1152.29; *see also NARPO,* 158 F.3d at 138. Subsequently, the interested trail operator files a railbanking petition that meets the statutory requirements reiterated in 49 C.F.R. § 1152.29(a). If the railroad agrees to negotiate a trail use agreement and so communicates to the STB, the STB will issue an NITU as a matter of course. 49 C.F.R. § 1152.29(d)(1). Thus, contrary to the view of the Court of Federal Claims, the NITU is issued only after the trail operator has been identified, and moreover, has indicated its "willingness to assume full financial responsibility and liability for the line and to agree to the railbanking condition for potential future reactivation of rail service." *Policy Statement on Rails to Trails Conversions,* slip op. at 3.

The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way. The

task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator. Indeed, the regulations do not even require the railroad and the trail operator to notify the STB that an agreement has been finalized, although a formal request to vacate the NITU is required if the operator intends at some future time to terminate trail use. 49 C.F.R. § 1152.29(d)(2).

After a final trail use agreement is reached, the NITU remains in effect indefinitely and "abandonment cannot be accomplished under the . . . NITU until trail use terminates (without restoration of rail service)." *Policy Statement on Rail Abandonments – Use of Rights of Ways as Trails,* Ex Parte No. 274 (Sub-No. 13), 5 I.C.C.2d 370, 373, 1989 WL 238666 (1989) If, however, "no trail use agreement is reached within 180 days, the . . . NITU converts into a . . . notice of abandonment," *id.*, which "permit[s] the railroad to fully abandon the line." 49 C.F.R. § 1152.29(d)(1); *see also Preseault I,* 494 U.S. at 7 n. 5, 110 S.Ct. 914. If no trail use agreement is reached within 180 days, but the railroad wishes to continue negotiations with the trail operator rather than consummate abandonment, the regulations also allow the NITU to be extended, as was done in this case. 49 C.F.R. § 1152.29(e)(1).

Thus, the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. *Preseault II,* 100 F.3d at 1552; *see also Toews,* 376 F.3d at 1376. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking

may have occurred.[7] It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.[8]

Indeed, the Supreme Court has previously contemplated precisely this possibility. In *United States v. Dow,* 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958), the Court also grappled with the issue of fixing the accrual of a takings claim. The question was whether the taking accrued at the time when the initial judgment of "immediate possession" was obtained, or three years later, when the government filed a declaration under the Declaration of Taking Act and title formally passed. At issue was respondent Dow's ability to collect compensation from the government, as Dow had purchased the property from the original owner after the government physically occupied the property, but before the formal conveyance of title to the government. Dow had argued that no permanent taking occurred until the filing of the declaration and the formal passage of title, and that only a temporary taking

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[7] This case does not involve, and we do not herein address, whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached.

[8] *See Seiber v. United States,* 364 F.3d 1356, 1365 (Fed.Cir.2004) (denial of permit triggers takings claim that, depending on later government action, may be temporary or permanent); *Cooley v. United States,* 324 F.3d, 1297, 1299-300 (Fed.Cir.2003) (same); *see also Boise Cascade Corp. v. United States,* 296 F.3d 1339, 1347 (Fed.Cir.2002) ("[T]he initial denial of a permit is still a necessary trigger for a ripe takings claim.... If the government denies a permit, then the aggrieved party can seek compensation. If at some point the government reconsiders the earlier denial and grants a permit (or revokes the permitting requirement), then the aggrieved party can seek compensation for a 'temporary regulatory taking'.") (internal footnote omitted).

occurred with the government's physical occupation of the land.

The Court held that the taking occurred at the earlier date, when the government entered into physical possession of the land and the owner was deprived of valuable property rights, even though title had not formally passed. *Id.* at 23, 78 S.Ct. 1039. The Court rejected, as "bizarre," the argument that there were "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." *Id.* at 24, 78 S.Ct. 1039. Rather, the Court endorsed a rule similar to the one that we adopt here, namely that a taking occurs when the owner is deprived of use of the property, there by physical possession, here by blocking the easement reversion. While the taking may be abandoned – in *Dow,* by the government's possible surrender of possession prior to the formal passage of title, here by the termination of the NITU – the accrual date of a single taking remains fixed. As the Court observed in *Dow,* the government's decision to abandon the taking "merely results in an alteration in the property interest taken – from full ownership to one of temporary use and occupation." *Id.* at 26, 78 S.Ct. 1039.

We therefore hold that the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued. The NITU marks the "finite start" to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued. *See, e.g., Seiber,* 364 F.3d at 1364.

II

Having determined that the appellants' takings claim accrued on the date when the NITU was issued, we must now determine if the six-year statute of limitations bars Caldwell's claim in this case. We hold that the statute of limitations is a bar here under either of the two potential dates of NITU issuance. The first NITU was issued on August 31, 1994, for the 7.4-mile segment. The scope of the NITU was enlarged to cover the full 10.6 miles on June 2, 1995. Both of these dates are more than six years before the complaint in this case was filed, and therefore Caldwell's claim is barred by the statute of limitations.

III

Appellants further argue that our decision in *Stone Container Corp. v. United States,* 229 F.3d 1345 (Fed.Cir. 2000), would apply to toll the statute of limitations during the eleven-month pendency of a class action in Kansas filed by Cheryl Swisher in October 1998.

We conclude that Caldwell has waived on appeal the argument that the statute of limitations was tolled during the eleven-month pendency of the *Swisher* class action. This issue was first raised below not at trial, but in a motion for reconsideration under Rule 59(a) of the Rules of the Court of Federal Claims. While Caldwell reargues the merits of the tolling argument on appeal, Caldwell did not meet the rigorous standards of RCFC 59(a). Motions for reconsideration must be supported "by a showing of extraordinary circumstances which justify relief." *Fru-Con Constr. Corp. v. United States,* 44 Fed.Cl. 298, 300 (1999), *aff'd,* 250 F.3d 762 (Fed.Cir.2000) (table). In particular, Caldwell fails to refute the court's finding that raising the

tolling argument for the first time on a Rule 59(a) motion was improper because the pendency of the 1998 Kansas class action was inherently knowable to Caldwell and should have been raised in response to the government's motion to dismiss for lack of jurisdiction. In any event, even with the claimed eleven months of equitable tolling, Caldwell's filing of October 7, 2002, is barred under the six-year statute of limitations, since his claim accrued no later than June 2, 1995.

CONCLUSION

We hold that the Fifth Amendment taking, if any, under the Trails Act is accomplished when an NITU is issued and state law reversionary interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled. Because Caldwell's claim was filed on October 7, 2002, more than six years after either of the NITUs issued in this case, that claim is barred by the statute of limitations under 28 U.S.C. § 2501. The decision of the Court of Federal Claims dismissing the appellants' claim is

AFFIRMED.

COSTS

No costs.

PAULINE NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the court's ruling that the statute of limitations started to accrue from a date before

the Caldwell property was "taken" in Fifth Amendment terms. All authority is contrary to this position.

Neither the dates of the Interstate Commerce Commission's authorization to the Norfolk Southern Railroad to abandon railroad use and negotiate transfer of the easement (the ICC's Notices of Intent to Use, whose dates of August 31, 1994 and June 2, 1995 are selected by the panel majority as the dates on which the statute of limitations started to accrue), nor the date the City of Columbus notified the ICC of the intended trail use (the date of July 5, 1996 chosen by the Court of Federal Claims) was an actionable taking of property. Neither event vested a cause of action in the owner of the fee, for neither event was a ripened taking. Neither the federal approval to discontinue railway operations, nor the ongoing negotiation between the railway and the city concerning conversion to trail use, vested a right of compensation by the United States. Thus neither of these events started accrual of the six-year period of limitations of 25 U.S.C. § 2501. *See Alliance of Descendants of Texas Land Grants v. United States,* 37 F.3d 1478, 1481 (Fed.Cir.1994) ("a claim under the Fifth Amendment accrues when the taking action occurs"); *Steel Improvement & Forge Co. v. United States,* 174 Ct.Cl. 24, 355 F.2d 627, 631 (1966) (same).

A Fifth Amendment taking can indeed flow from a Trails Act conversion of a railway easement. *See Preseault v. United States,* 100 F.3d 1525, 1553 (Fed.Cir.1996) (*en banc*). However, these plaintiffs could not have prosecuted their claim until the taking occurred. The taking occurs "when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Seldovia Native Association, Inc. v. United States,* 144 F.3d 769, 774 (Fed.Cir.1998). Until the easement was

transferred to the City of Columbus, Norfolk Southern Railroad not only continued as owner of the right-of-way, but retained all of the benefits and obligations of ownership, including the right to exclude, the obligation to pay taxes, and liability for injury and liens. Until the right of trail use was vested in the City the cause of action had not ripened, and liability of the government for compensation was not fixed. Suit at this stage would have simply been premature; the statute of limitations can not start to accrue before suit could have been filed.

Under the Trails Act and its implementing regulations, not only must an "interim trail manager" (the City of Columbus) be approved by the ICC, but the interim trail manager must "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way." 16 U.S.C. § 1247(d) (1994). These obligations were not incurred until transfer of the deed at the legal Closing; until the Closing, the railroad continued to own the right-of-way, the City of Columbus did not possess and could not occupy the property, and the City could not convert it into a recreational trail. Until these events occurred the owners of the fee were not "clearly and permanently deprived," and the liability of the government to pay compensation was not fixed. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 7-8, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) (conversion to trail use may be subject to Tucker Act remedy for Fifth Amendment taking); *Seldovia*, 144 F.3d at 774 ("the key date for accrual purposes is the date on which Seldovia was clearly and permanently deprived of the lands it had selected").

On October 9, 1996 the Norfolk Southern Railroad conveyed to the City of Columbus the deed for the 10.6 mile right-of-way. I cannot agree that the plaintiffs could have brought earlier suit and obtained compensation for this taking, based on the ICC's authorizations on August 31, 1994 and June 2, 1995 to Norfolk Southern to negotiate a Trails Act conversion. These preliminary events did not fix a ripe takings claim. Negotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking. The owners of the fee had no right to compensation based on or at the time of these authorizations to negotiate; thus these authorizations could not accrue the period of limitations.

Nor were the various negotiating documents involving the City of Columbus, starting with the document of August 17, 1995 styled "Purchase Agreement," an actionable taking. This Agreement, from which the City could withdraw on five days' notice, was amended on April 18, 1996 to add the Trails Act's requirement that the manager accept financial and legal responsibility; this acceptance in turn was conditioned on completion of the transaction, and only then would become operable. Thus an Amendment to the Purchase Agreement stated that "at closing Buyer, its successor or assignee, shall assume full responsibility for the management of the right of way, for any legal liability arising out of its transfer or use, and for any payment of taxes in accordance with the requirements of section 8(d)." Another amendment dated July 1, 1996 provided that the City and the railroad would jointly request the ICC (now named the Surface Transportation Board) to extend the time period for negotiation of a "mutually acceptable interim trial use/railbanking agreement" through and including November 1, 1996. Thus the Agreement itself

documented its own negotiating status; these documents could not have formed the basis of a takings action by July 5, 1996, as the Court of Federal Claims held in selecting the date when the City and the railway jointly requested the time extension for further negotiation. This Agreement and its amendments were recordations of the negotiation, not a completed transaction having Fifth Amendment consequences.

Taking claims accrue when the liability of the government is fixed, not simply prospective. In *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573 (Fed.Cir. 1988) the court reiterated that

> for the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence.

Id. at 1577. These events occurred when the City acquired the deed and the right to occupy and use the property. The Court explained in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), that permanent physical occupation occurs "where persons are given a permanent and continuous right to pass to and fro." That did not occur until the Closing, when the deed and the right of occupancy and use were transferred.[1] Before these events the period of limitations did not start

[1] It is not necessary to decide whether the date of accrual of the limitations period was the transfer of the deed at the Closing on October 9, 1996, or its recordation a few days later, or the Notification from the City of Columbus to the ICC on November 5, 1996, because this suit was filed within six years of the earliest of these dates.

to accrue, for neither the ICC's Notice that permitted negotiation for trail use, nor the various documents implementing those negotiations, ripened a claim for compensation. Intentions are rarely actionable; it is the consummation that accrues legal rights.

The panel majority places great weight on *United States v. Dow,* 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In *Dow* the Court held that a taking occurs upon possession and occupancy of the property, and that a subsequent filing under the Declaration of Taking Act did not negate the effect of the earlier possession and occupancy. *Id.* at 22, 78 S.Ct. 1039. In *Dow* the government in 1943, by eminent domain, obtained a judgment of "immediate possession" of a right-of-way through a larger tract of land, entered into immediate possession of the right-of-way, and within ten days began laying a pipeline through the tract. In 1945 the owners conveyed the entire tract to Dow, including their right to any compensation for the land taken by eminent domain; and in 1946 the government filed in court a declaration of taking, obtained title to the right-of-way, and deposited estimated compensation with the court. The issue was Dow's rights under the Assignment of Claims Act; there was no issue of the running of a statute of limitations. The Court held that the taking occurred when the United States entered into possession in 1943, when the government "entered and appropriated the property to public use," *id.* at 23, 78 S.Ct. 1039, and that the taking neither awaited the later transfer of title to the right-of-way, nor was negated by the later proceeding. The Court stressed that the determinative event of the taking was whether "the Government has already entered into possession." *Id.* at 25, 78 S.Ct. 1039. This case well supports the plaintiffs herein.

It is not disputed that the City of Columbus did not possess and occupy the property, and had no authorization or right to do so, until the Closing and transfer of the deed. Although the panel majority relies heavily on *Dow,* the analogy is not apt. In *Dow* the government was in full possession of the property it had obtained by condemnation decree and was actively building the pipeline; thus the Court held that the taking had occurred. In contrast, the authorization from the ICC to the Railway and the City to start to negotiate did not change the possession and occupancy of the easement. My colleagues' view that it is irrelevant when title passes does not mean that the property was earlier taken; that is not the rule of *Dow.* To the contrary, *Dow* strongly reinforces the position that the Norfolk Southern right-of-way was not taken and compensable until there was a transfer of possession and occupancy, an event that did not occur until the date of Closing and the transfer of the deed.

Thus I must, respectfully, dissent from the court's conclusion that the statute of limitations started to accrue when the parties told the ICC that they were negotiating for the purpose of reaching a trail use agreement.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1347L
(Filed June 30, 2003)

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III, for Themselves and as Representatives of a Class of Similarly Situated Persons, Plaintiffs, v. **THE UNITED STATES,** Defendant.	Taking: Trails Act; rails-to-trails; statute of limitations; RCFC 12(b)(1); RCFC 12(h)(3); 28 U.S.C. § 2501 (2002); 28 U.S.C. § 1491 (2002); 16 U.S.C. § 1247 (2002); 49 C.F.R. § 1152 (2002).

James P. Kelly, Atlanta, GA, for plaintiffs. *Jeffrey O. Bramlett, John E. Floyd, Benjamin E. Fox*, and *Sarah M. Shalf*, Bondurant, Mixson & Elmore, LLP, Atlanta, GA of counsel.

Kristine S. Tardiff, Concord, MH, with whom was *Assistant Attorney General Thomas L. Sansonetti*, Washington, DC, for defendant. *Evelyn Kitay*, Surface Transportation Board, of counsel.

OPINION

MILLER, Judge.

This case is before the court after oral argument on defendant's motion to dismiss plaintiffs' complaint for lack

of jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3). Plaintiffs seek, pursuant to the Tucker Act, 28 U.S.C. § 1491 (2002), just compensation for a taking effected pursuant to the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247(d)(2002). Defendant invokes the bar of the applicable six-year statute of limitations, 28 U.S.C. § 2501 (2002).

FACTS

The facts in this case are not disputed. William B. Caldwell, III, and Ben F. Billings, III ("plaintiffs"), have brought suit on behalf of themselves and all other similarly situated landowners in the state of Georgia. Plaintiffs allege that they are the fee simple owners of certain land in Georgia that historically was subject to a railroad easement held by Norfolk Southern Railway Company ("NSR"). They further allege that their ownership interests in this railroad corridor were taken from them by the actions of the Government under the National Trails System Act (the "Trails Act"), 16 U.S.C. § 1247(d)(2002). Defendant resists the claim on jurisdictional grounds, citing 28 U.S.C. § 2501 (2002).

1. *Statutory and regulatory background*

The statutory and regulatory framework surrounding the Trails Act is central to determining the timeliness of plaintiffs' claim. The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, as amended and revised, and the Transportation Act of 1920, ch. 91, 41 Stat. 477-78, give the Interstate Commerce Commission (the "ICC")[1] exclusive

[1] The ICC was abolished effective January 1, 1996; the Surface Transportation Board assumed authority to regulate under the Trails

(Continued on following page)

and plenary authority over the construction, operation, and abandonment of virtually all of the nation's rail lines. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). *See generally RLTD Ry. Corp. v. Surface Transp. Bd.*, 166 F.3d 808, 810-11 (6th Cir.1999) (discussing railroad regulation). A railroad cannot be relieved of its legal obligation to offer service on a particular rail line without first obtaining the express consent of the ICC. *See Colorado v. United States*, 271 U.S. 153, 165, 46 S.Ct. 452, 70 L.Ed. 878 (1926); *National Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 137 (D.C. Cir.1998); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 773 (2000). By imposing this regulatory restriction, "Congress sought to balance the railroad companies' need to dispose of trackage that was no longer profitable with the public's need for a working interstate track system." *RLTD*, 166 F.3d at 810.

In 1983 Congress passed the Trails Act, providing a railroad seeking to abandon or discontinue its use of a rail line with an option: railbanking. The term railbanking refers to the "preservation of railroad corridor for future rail use," while making the corridor available for other activities. *Nebraska Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 903 n.1 (8th Cir.1997). The right-of-way is "banked" until such future time as railroad service is restored. *See Chevy Chase Land Co. v. United States*, 37 Fed.Cl. 545, 554 (1997), *aff'd*, 230 F.3d 1375, 1999 WL 1289099 (Fed.Cir.1999), *cert. denied*, 531 U.S. 957, 121

Act. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). For the purposes of this opinion, the court refers to the ICC as the relevant authority, as the origins of the dispute pre-date the ICC's abolition.

S.Ct. 380, 148 L.Ed.2d 293 (2000). Railbanking therefore represents an alternative to abandonment. *RLTD*, 166 F.3d at 811. "Congress determined that interim trail use was to be treated like discontinuance rather than as an abandonment." *Grantwood Vill. v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996), *cert. denied*, 519 U.S. 1149, 117 S.Ct. 1082, 137 L.Ed.2d 216 (1997). Thus, the Trails Act operates "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Preseault v. ICC*, 494 U.S. 1, 6, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990).

For a railroad corridor or right-of-way to be railbanked, the railroad first must engage in the ICC's regulatory abandonment process by filing either an abandonment application under 49 U.S.C. § 10903 (2002), or by seeking an exemption under 49 U.S.C. § 10502 (2002). Once an entity has filed an abandonment application or request for an exemption with respect to a given railroad, a party interested in acquiring or using the right-of-way for railbanking and interim trail use may request the issuance of a certificate of interim trail use ("CITU") (in abandonment application proceedings) or a notice of interim trail use ("NITU") (in abandonment exemption proceedings, as in the case at bar). 49 C.F.R. § 1152.29(a), (b)(1)(ii) & (d)(1) (2002).

The ICC's regulations require that a qualified party interested in "acquiring or using" a right-of-way to file a request or petition that includes: 1) a map of the right-of-way, or portion thereof, that is proposed to be acquired or used; 2) a statement of willingness to assume responsibility for the right-of-way, including management responsibility, legal liability, and payment of applicable taxes; and 3) an acknowledgment that interim trail use of the right-of-way is subject to "possible future reconstruction and

reactivation of the right-of-way for rail service." § 1152.29(a)(1)-(3).

The ICC, having received the required documentation, determines whether to grant the request by applying a "rebuttable presumption of fitness" to the potential trail sponsor. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir.2001). When a complete request for the issuance of a NITU is received, and the railroad indicates that it is willing to negotiate a Trail Use Agreement, the ICC issues a NITU. 49 C.F.R. § 1152.29(b)(1); *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990); *Citizens Against Rails-to-Trails*, 267 F.3d at 1151-52. The NITU stays the effective date of the abandonment authority for 180 days in order to allow the railroad and the authorized trail group to negotiate a railbanking and interim Trail Use Agreement. § 1152.29(d)(1).

If the parties do not reach a Trail Use Agreement during the initial negotiating period allowed by the NITU, and the ICC does not extend the negotiating period, the NITU authorizes the railroad to exercise its option to abandon the line without further action by the ICC. *Reversionary Prop. Owners*, 158 F.3d at 139. If an agreement is reached, the NITU automatically authorizes the interim trail use. *Id.* If the ICC takes no further action, the trail sponsor then may assume management of the right-of-way, subject only to the right of a railroad to reassert control of the property for restoration of rail service. *Goos*, 911 F.2d at 1295; § 1152.29(d)(2).

2. *Factual background*

The railroad corridor at issue in this case is located in Columbus, Georgia (the "City of Columbus" or the "City").

It is locally known as the Warm Springs Rail Line and spans approximately 10.5 miles. The corridor originally was part of a 97-mile rail line from Columbus to McDonough, Georgia. The rail line was opened on December 1, 1887, and by 1990 it was owned and operated by NSR.

In 1992 the City of Columbus publicly introduced its "Columbus Alternative Transportation System," or "CATS" plan, which included a recommendation to construct pedestrian walkways and bikeways on existing railroad corridors. The CATS plan stated that one of the key components of the system was to obtain the Warm Springs Rail Line from NSR.

On May 5, 1994, NSR published a notice of intent to file a notice of exemption under 49 C.F.R. § 1152.50, which governs exempt abandonments, seeking permission from the ICC to abandon a 7.4-mile segment of rail line between milepost 90.0 in Meyer, Georgia, and milepost 97.4 in Columbus, Georgia. On July 5, 1994, NSR filed with the ICC its notice of exemption under section 1152.50 to abandon the 7.4 miles of rail line. On July 26, 1994, the ICC issued an order allowing the exemption, effective August 25, 1994, conditioning it on certain events.

By letter dated August 11, 1994, NSR notified the ICC that it was "willing to negotiate for a trail use agreement with the City of Columbus, GA for the subject line" and that it consented to the issuance of a NITU. By letter dated August 12, 1994, the City of Columbus requested the issuance of a NITU and submitted its statement of willingness to assume financial responsibility for the rail corridor. The NSR reconfirmed in a letter dated August 17,

1994, that it agreed to negotiate with the City for rail-banking and interim trail use.

The ICC issued a NITU for the rail corridor effective August 31, 1994. The ICC afforded the parties 180 days in which to negotiate a railbanking agreement, stating: "If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, [NSR] may fully abandon the line." On February 23, 1995, during the 180-day negotiating period, the City and NSR jointly requested that the NITU be expanded to cover an additional 3.2-mile segment of the same corridor.[2] The ICC subsequently issued a decision dated May 25, 1995 (effective June 2, 1995), consolidating the proceedings involving the 3.2-mile segment with those involving the 7.4-mile segment. This decision also extended the NITU negotiating period to August 26, 1995.

On August 17, 1995, just prior to the expiration of the NITU negotiating period, NSR entered into a purchase and sale agreement with the Trust for Public Land, the entity selected by the City to negotiate the acquisition of the rail corridor from NSR. This agreement was amended on April 18, 1996, and July 1, 1996. On April 30, 1996, the City Council approved the acquisition of the rail corridor. The Columbus City Council, at its October 24, 1995 meeting, authorized and directed the completion of title and environmental examinations of the corridor. The Trust

[2] The original 7.4-mile segment extended from milepost 97.4 to milepost 90.0. The additional 3.2-mile segment extended from milepost 90.0 to milepost 86.8.

for Public Land assigned its rights under the agreement to the City on July 2, 1996. NSR executed a quitclaim deed to the City on October 9, 1996. The deed was recorded on October 11, 1996.

By motion filed July 5, 1996, the City notified the ICC that "[a] railbanking agreement [the 'Trial Use Agreement'] has been reached by the parties." However, the City also requested an extension of the NITU "in order to ensure that the railbanking period extends through the time of the actual transfer of the corridor to the interim trail manager, which is anticipated to occur on or before November 1, 1996, and to cover any gaps that may have inadvertently occurred in the railbanking negotiating period." NSR consented to the City's motion, which was granted by the Surface Transportation Board on August 6, 1996.

On October 7, 2002, plaintiffs filed a complaint alleging a taking effected by the Trails Act. Plaintiffs brought their action as the representatives of a class consisting of all persons who, in October and November 1996, owned an interest in the land burdened by the railway easement, which was subject to the City's Trail Use Agreement.

DISCUSSION

1. *Jurisdiction*

The Fifth Amendment to the U.S. Constitution ensures that the United States does not take private property for public use without just compensation. U.S. Const. amend. V. When the Government does not provide compensation through eminent domain proceedings, the Tucker Act, 28 U.S.C. § 1491, operates to enforce a landowner's compensatory right. *Preseault v. ICC*, 494 U.S. at

11-12, 110 S.Ct. 914. Thus, plaintiffs' claim lies within the jurisdiction of the Court of Federal Claims under the Tucker Act.

An action in the Court of Federal Claims must be filed within six years of the claim's accrual. The timeliness of plaintiffs' claim therefore is governed by the statute of limitations set forth in 28 U.S.C. § 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The statute of limitations is a jurisdictional requirement "attached by Congress as a condition of the government's waiver of sovereign immunity, [and therefore] must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed.Cir.1988).

Plaintiffs' claim will be time barred absent a showing that it first accrued within six years of the date on which plaintiffs' complaint was filed. Under this threshold analysis, a claim first accrues when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band*, 855 F.2d at 1577.

2. *Standard of review*

The determination of whether this court has subject matter jurisdiction to hear plaintiffs' claim is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed.Cir.2002); *Maher v. United States*, 314 F.3d 600, 603 (Fed.Cir.2002). A Rule 12(b)(1) motion to dismiss challenges a court's subject matter jurisdiction over a claim based on plaintiff's jurisdictional allegations. Because "the

movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction[,]" the court, in establishing the jurisdictional facts, "is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings. . . . " *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed.Cir.1993), *cert. denied*, 512 U.S. 1235, 114 S.Ct. 2738, 129 L.Ed.2d 859 (1994); *see also Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed.Cir.1985), *cert. denied* 479 U.S. 820, 107 S.Ct. 84, 93 L.Ed.2d 37 (1986). Plaintiff in all such instances bears the burden of establishing jurisdiction by a preponderance of the evidence. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed.Cir.1988).

3. *Claim accrual*

The issue in this case requires the court to determine when the Government's action over the rail corridor had permanent legal effect, thereby resulting in the Government's liability for the taking being made "definite" or "fixed." In the Trail Act scenario, the Government's liability is set when plaintiffs' property had been definitely converted to public use and the plaintiffs were able to bring a claim under the Tucker Act.

Plaintiffs argue that their claim accrued when the deed to the land in question passed from NSR to the City. Defendant offers two key events for determining when plaintiffs' claim accrued. The first – and defendant's preferred reference point – was the date on which the ICC issued its initial NITU for each segment of the subject rail corridor. The second alternative date occurred when the parties signed the Trail Use Agreement. The court addresses each argument, in turn.

1) *Passage of the deed*

It is plaintiffs' position that the permanence required by takings case law is achieved only with the delivery of the deed from the railroad to the trail group. They contend that a Trail Use Agreement triggers the statute of limitations when the agreement itself transfers lease interest or financial responsibility for the land, as required by the Trails Act. However, plaintiffs argue that where, as here, the transfer of all interests cannot occur until the delivery of a quitclaim deed, an earlier purchase and sale agreement does not itself trigger the running of the statute of limitations. Therefore, the purchase and sale agreement does not activate the running of the statute of limitations.

Plaintiffs point out that the Trails Act provides that the interim trail manager must 1) "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way," 16 U.S.C. § 1247(d); and 2) agree that the transfer of trail use is "subject to possible future reconstruction and reactivation of the right-of-way for rail service," 49 C.F.R. § 1152.29(a)(3). According to plaintiffs, an inchoate purchase and sale agreement, standing alone, does not satisfy these requirements, but a consummated transfer of property does.

Two major problems inhere in plaintiffs' reasoning. First, it is not stated why plaintiffs focus on the significance of the purchase and sale agreement, as opposed to the Trail Use Agreement. The only relevant case law

focuses on the latter.[3] Plaintiffs present no case decided under the Trails Act suggesting that the relevant inquiry should be directed to the purchase and sale agreement, rather than the Trail Use Agreement. After all, it is the Trail Use Agreement that ends the NITU negotiation period. Second, plaintiffs do not make clear why the trail manager's assumption of duties should trigger a taking. Plaintiffs have presented no evidence suggesting that meeting the trail manager requirements constitutes a taking.

Plaintiffs further contend that takings under the Trails Act are analogous to condemnation proceedings. A taking in condemnation proceedings does not occur until either 1) the Government takes physical possession of the land without the authority of a court order, or 2) legal title passes to the Government pursuant to condemnation proceedings. *United States v. Dow*, 357 U.S. 17, 21, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In condemnation proceedings the announcement of a condemnation does not effect a taking; only the actual passage of title to the land does so. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14-15, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984).

In *Kirby* the Supreme Court did not find a taking "prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking under [this] theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property." 467 U.S.

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[3] The two cases, *Smith v. United States*, No. 97-581L (Fed.Cl. Sept. 29, 1999), and *Illig v. United States*, No. 98-934L (Fed.Cl. Nov. 12, 1999), are discussed at length *infra* § 3(3).

at 14-15, 104 S.Ct. 2187. Even in the context of a condemnation proceeding, however, the Supreme Court scrutinized first the severity of interference with plaintiff's property rights. Only then did the Court hold that the level of severity was met with the transfer of the deed. As an administrative matter, a condemnation announcement may threaten a landowner's rights to a lesser extent than the issuance of a NITU and the execution of a Trail Use Agreement. That difference could account for the Supreme Court's treating the condemnation announcement as constituting something less than a taking. The Court's holding in *Kirby* focuses less on the title to the land and more on the Government's interference with plaintiff's rights, and, to that extent, the case is instructive. It does not go so far, however, as to mandate that a taking in contexts other than condemnation proceedings can occur only with the passing of title.

Significantly, the Trails Act and its implementing regulations do not require a railroad to sell or transfer its ownership interest in the railroad corridor in order for that corridor to be railbanked and used for interim trail use. On the contrary, the statute expressly provides that interim trail use may occur by "donation, transfer, lease, sale, or otherwise." 16 U.S.C. § 1247(d). The applicable regulations also contemplate that a qualified trail group either can acquire or merely use the corridor for interim trail use or railbanking. 49 C.F.R. § 1152.29(a); *see also Chicago & N.W. Transp. Co. – Abandonment Exemption – Guthrie and Dallas Counties, IA*, No. AB-1 (Sub-No. 192X), 1987 WL 98423, at *4 (I.C.C. May 7, 1987) (trail use can occur under Trails Act "whether the involved railroad transfers or retains its interest in the right-of-way"); *Union Pac. R.R. Co. – Abandonment Exemption – In*

Saunders and Butler Counties, NE, No. AB-33 (Sub-No. 81X), 1994 WL 562032, at *3 (I.C.C. Sept. 28, 1994) ("Neither the Trails Act nor our regulations require a potential trail user to hold title ownership in the trail; a potential trail user must only file a statement indicating its willingness to assume financial responsibility. *The statement of financial responsibility imposes a legal obligation upon the trail user even if the user does not hold legal title.*" (emphasis added)). It would not make sense for a claim accrual date to be triggered by the execution of a deed from the railroad to the trail group when neither the Trails Act nor its implementing regulations require a deed be transferred before the trail group may use the right-of-way.

During oral argument plaintiffs argued that *Chevy Chase*, 37 Fed.Cl. 545, supports their contention that the statute of limitations for a takings claim under the Trails Act begins to run upon the delivery of the deed. Plaintiffs in *Chevy Chase*, a land company and a country club, sued the United States alleging a taking after Montgomery County, Maryland, purchased a rail corridor pursuant to the Trails Act. The land company asserted that it owned the right-of-way strip and that the railroad's postponing of its abandonment obstructed the land company's full fee simple property interest in the strip. The country club argued that it used a portion of the right-of-way as part of its golf course. It also argued that it had easements to other parts of the right-of-way protecting the use of its land as a golf course.

While the *Chevy Chase* court's analysis regarding the CITU issuance and Trail Use Agreement was general and seems to apply to both plaintiffs in the case, the court's conclusion distinguishes between the two plaintiffs. The

court's analysis regarding the land company focused on the CITU issuance and the Trail Use Agreement. The court's discussion of the country club's claim focused on the purchase date of the land in question. The court explained:

> The Club's complaint, filed on January 22, 1993, is also timely. The actual taking alleged by the Club is somewhat different from that alleged by [the land company]. The Club objects to an excess use of the right-of-way by Montgomery County. It asserts that implementation of the proposed plan will interfere with its ability to utilize its golf course – portions of which are located within, and the majority of which is located adjacent to – the right-of-way. As such, the Club's alleged taking claim did not accrue until Montgomery County purchased the right-of-way in 1988.

Id. at 564. The accompanying footnote reads:

> Further, whether Montgomery County merely has an easement – or if Montgomery County bought a fee simple – does not matter with regard to the Club's claims, because the Club asserts that its property interests within the right-of-way as well as its adjacent property will be affected by this purchase and accompanying intended use in either case.

Id. at 564 n.17. *Chevy Chase* suggests that the claim accrual analysis differs depending on whether the interim trail use effects a taking of plaintiff's interest in the corridor lands, as opposed to merely affecting plaintiff's ability to use its existing lands. Because the case at bar deals with the former situation, the court does not reach the question of whether such a distinction bears on the date of claim accrual. Suffice it to say that *Chevy Chase*

does not endorse a blanket rule triggering the statute of limitations as of the date of purchase. Indeed, the distinction between the land company and the country club supports defendant's argument that, where plaintiff alleges a taking of its land, not merely the use of its land, the Trail Use Agreement governs the claim accrual.

Plaintiffs have not argued convincingly that the court should focus on the purchase and sale agreement, rather than the administrative consummation of the taking, which culminates with the Trail Use Agreement.[4] Plaintiffs have not carried their burden of proof to establish that this court has jurisdiction over its claim based on the date of the purchase and sale agreement.

2) *Issuance of the NITU*

Defendant first argues that the correct claim accrual date is the date on which the ICC issued the NITU's for each rail segment: August 31, 1994 for the 7.4-mile segment; and June 2, 1995, for the 3.2-mile segment. Federal Circuit decisions involving Trails Act cases have not addressed directly the question of claim accrual. In *Preseault v. United States*, 100 F.3d 1525 (Fed.Cir.1996) (*en banc*), the court ruled on whether a conversion of a rail corridor, authorized by the ICC, constituted a taking under the Fifth Amendment. The State of Vermont Agency of Transportation, joined by Vermont Railway, entered into

[4] For this reason the court does not deem necessary a discussion of plaintiffs' alternative accrual dates, including the date on which the deed was recorded, the date on which the City authorized its mayor to execute agreements with NSR and the Trust for Public Lands, or the date on which the City filed a "Notification of Railbanking/Interim Trail Use Agreement."

a lease with the City of Burlington, dated June 18, 1985, whereby the former two entities leased a rail corridor to the latter for use as a bicycle and pedestrian path. The ICC issued a NITU the following year, on February 5, 1986. *See Preseault v. United States*, 24 Cl.Ct. 818, 822-23 (1992), *rev'd and remanded*, 100 F.3d 1525. Plaintiffs filed their takings claims on December 26, 1990, in the Court of Federal Claims, rendering their complaint timely under any application of the statute of limitations.

A plurality of the Federal Circuit agreed that "[u]ntil the ICC makes the administrative decision to convert an unused right-of-way to a trail, rather than simply permit abandonment, and finds an appropriate public agency to operate the trail, a landowner's suit for a taking would run afoul of established requirements of exhaustion of administrative remedies." 100 F.3d at 1538. Defendant argues that this language in *Preseault* requires that the court look to the issuance of the NITU as the required administrative action on which to predicate the commencement of the limitations period.

Defendant's argument suffers from two infirmities. First, defendant disregards the second clause in the sentence quoted from *Preseault*, requiring the ICC to select an appropriate public agency to operate the trail. This requirement is met only after the parties successfully negotiate a Trail Use Agreement. If the parties reach an agreement within the 180-day negotiating period, the interim trail use is authorized by the NITU; if no agreement is reached, abandonment is authorized automatically. Thus, the signing of the Trail Use Agreement satisfies the administrative action requirement described in *Preseault*.

Second, *Preseault* also placed great weight on the fact that plaintiffs in that case could not have brought suit before the taking had been finalized. *See* 100 F.3d at 1538. If plaintiffs in *Preseault* had initiated a suit after the issuance of the NITU, but before the ICC had found an appropriate public agency to operate the trail, their claims would have been subject to a ripeness challenge. *Id.* Plaintiffs in the case at bar argue that, just as the Government's liability could not have been fixed at the time of the NITU's issuance, the statute of limitations also could not have been triggered at that time. Plaintiffs conclude that the ripeness challenge would preclude the statute's running following issuance of the NITU and the authorized party's taking title to the land.

Although the court reads the Federal Circuit's *Preseault* opinion to hold that the tolling of a statute of limitations could not begin before the ICC's issuance of the NITU, the appeals court did not go so far as to suggest that the NITU issuance in fact initiates the running of the statute. This court agrees with plaintiffs that it is axiomatic that, if plaintiffs' claim would be open to a ripeness challenge even after the issuance of the NITU, the statute of limitations could not run concurrently to diminish their rights.

Defendant argues that another Federal Circuit case, *Bass Enterprises Production Co. v. United States*, 133 F.3d 893 (Fed.Cir.1998), supports its proposition that the statute is triggered at NITU issuance. Plaintiffs in that case alleged a taking of their leasehold-derived right to drill for oil and gas on certain federal lands after the Bureau of Land Management (the "BLM") denied their application for a permit to drill. The denial was temporary, pending a determination as to whether plaintiffs' leases

must be condemned to protect the integrity of an underground nuclear waste repository under construction in the area of the leases. Although the trial court found that the BLM's permit denial constituted a permanent taking of plaintiffs' property, the Federal Circuit reversed, stating:

> Congress has expressly established a mechanism for condemning the leases at issue if deemed necessary to ensure the integrity of the [nuclear waste] facility. Such events are statutorily mandated to occur. Thus, in the interim, the denial of the permits is at best a temporary taking. The statutorily mandated end to the regulatory process will result in a decision whether or not to condemn the leases. Although the precise date is unknown, it is clear that such a decision is required to be made. Thus, we conclude that the denial of the drilling permits at this time does not constitute a permanent taking.

133 F.3d at 895-96. The case was then remanded for a determination of whether the BLM's denial of a permit constituted a temporary taking. Defendant argues that the *Bass* plaintiffs' takings claims all related back to a single government action – the BLM's denial of a permit. By analogy, defendant contends that plaintiffs in the case at bar were in the same situation when the ICC issued the NITU: The fate of their land rights was unknown, but, at least temporarily, their rights were suspended.

While defendant's argument has intellectual appeal, it ultimately cannot surmount the precedent enunciated in *Preseault*. The Federal Circuit in *Preseault* did not look at the last government action, as defendant urges, but, rather, focused on the end of the administrative process, which the Government set into action with the NITU issuance, but which concluded with the execution of the

Trail Use Agreement. *Preseault's* dependence on administrative finality in the context of the Trails Act prevents the court from relying on the loose analogy that defendant draws from *Bass*.

Defendant argues that *Chevy Chase*, 37 Fed.Cl. 545, also supports its contention that the statute began to run upon the issuance of the NITU. Defendant proffers the decision as finding that the administrative approval occurred with the issuance of the CITU and that plaintiff land company's claims therefore were timely. The court wrote:

> A taking cannot occur under 16 U.S.C. § 1247(d) until either (1) a railroad effects an abandonment of a railroad easement under state law but the reversion to the fee owner is obstructed by way of federal statute, and/or (2) an approval of a plan for a hiker/biker trail which would burden a right-of-way with an additional servitude. *See, e.g., Preseault*, 100 F.3d at 1538-39. Only at either of these two points would the implementation of the Trails Act actually cause a taking of property of an underlying fee owner. *Id.* . . .
>
> However, the statute of limitations does not start to run until there has been an administrative determination [approving trail use] and assignment to a hiker/biker trail.

Id. at 563

Chevy Chase leaves open the question of whether the date of the NITU issuance, as opposed to the date of the Trail Use Agreement, marks the accrual of a plaintiff's claim. In the above passage, the court suggests that either date is possible; it uses the terms "either" and "and/or," but

then links the conditions with an "and" in the final sentence.[5]

This court interprets the last sentence to mean that the existence of an administrative approval is a necessary, but not sufficient, factor required to trigger a takings claim. The last phrase indicates that the administrative action must be supplemented by an assignment to a hiker/biker trail before the statute of limitations can run, which essentially engrafts a condition on the second event. Thus, *Chevy Chase* specifies abandonment or an administrative determination, coupled with assignment to a hiker/biker trail. *Chevy Chase* does not support defendant's argument that the issuance of a NITU is sufficient to trigger the running of the statute of limitations for the purposes of 28 U.S.C. § 2501.

3) *Trail Use Agreement*

The Court of Federal Claims, in two unpublished decisions,[6] has selected the execution date of the Trail Use Agreement as the date triggering the statute of limitations under 28 U.S.C. § 2501. In *Smith v. United States*, No. 97-581L (Fed.Cl. Sept. 29, 1999), the ICC issued a NITU in August 1989. The railroad and the qualified trail group entered into a Trail Use Agreement approximately five

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[5] It is worth noting that another decision from the Court of Federal Claims interprets *Chevy Chase* to leave open the question of when the statute of limitations began to run. *See Smith v. United States*, No. 97-581L, slip op. at 4 (Fed.Cl. Sept. 29, 1999) ("*Chevy Chase* leaves open the question of whether the date of the issuance of the CITU/NITU, as opposed to the date of the subsequent Trail Use Agreement, appropriately marks the accrual of a taking claim of this nature.")

[6] The parties rely on them, so the court follows suit.

months after the ICC issued the NITU. Although plaintiff's claim would have been untimely under either measure – either from the NITU issuance or the Trail Use Agreement execution – the court held that the statute of limitations began to run when the parties signed the Trail Use Agreement. The court reasoned that prior to the Agreement, "it is uncertain whether the CITU/NITU will take effect, and thus the reversionary right might still vest in the underlying owner." Slip op. at 4. The court went on to hold:

> It is not until the use of the easement, and the resulting burden on the underlying land owner, is fixed by way of a trail use agreement that the rights of the land owner are effected [sic] in a manner that gives rise to a permanent taking claim under the Fifth Amendment and the Tucker Act. *See Preseault*, 100 F.3d at 1537[-38] ("Until the ICC makes the administrative decision to convert an unused right-of-way to a trail, rather than simply permit abandonment, and finds an appropriate public agency to operate the trail, a landowner's suit for a taking would run afoul of established requirements for exhaustion of administrative remedies"). Accordingly, as plaintiffs' suit here was filed more than six years after . . . the date of the formal agreement, it is untimely and must be dismissed.

Id.

Defendant dismisses *Smith* as erroneously decided because the NITU is effective when issued to delay the vesting of any reversionary interests in the underlying owner of the railroad corridor land. However, the NITU takes effect only if the right-of-way meets the criteria for abandonment and negotiation of trail use occurs. Authorization to abandon

the rail line b omes effective only when the 180-day negotiation period expires. The court's inquiry thus should focus on when the taking becomes permanent; as *Smith* reinforces, the mere issuance of a NITU does not represent the permanent taking of land rights by the Government. This court therefore agrees with the *Smith* court analysis that a permanent taking occurs when the parties successfully negotiate a Trail Use Agreement.

Plaintiffs respond that *Smith* does not address the question presented in the case at bar. Although *Smith* decided that, as between the NITU issuance and the Trail Use Agreement, the latter begins the statute of limitations, *Smith* did not involve a transfer of a property interest – only a transfer of possessory interest and financial responsibility. The transfer of responsibility occurred pursuant to the Trail Use Agreement, and the court did not consider whether the date of execution of a deed transferring property interest might be the point of taking. Plaintiffs therefore label *Smith* as factually distinguishable.

The court appreciates the difference between the facts in *Smith* and the facts in the case at bar, but the distinction that plaintiffs highlight is not material. As in *Preseault*, the analysis in *Smith* focuses on the severity of the interference with the landowner's rights to determine when the taking is fixed. Neither *Preseault* nor *Smith* makes its holding contingent on the nature of the proprietary interest. The courts' analysis in these cases focuses on the point at which the taking is fixed in the administrative process. Both cases determine that this point occurs when the Trail Use Agreement is finalized.

The Court of Federal Claims, in another unpublished opinion, *Illig v. United States*, No. 98-934L (Fed.Cl. Nov. 12, 1999), again focused on the permanence of the taking to resolve the question of when a statute of limitations begins to run for the purposes of 28 U.S.C. § 2501. In *Illig* the ICC issued a NITU on March 27, 1992. The parties signed the relevant Trail Use Agreement on December 30, 1992. Plaintiff filed its takings claims on December 28, 1998, rendering them untimely if measured from the NITU date, but timely if measured from the date of the agreement. Finding that plaintiff's claims accrued on the later date and therefore were not barred, the court reasoned that, had the railroad and trail group "failed to effect the conversion of the railway to a trail, the NITU would be rightly seen as having had no permanent legal effect on the property rights of the plaintiff. Prior to December 30, 1992, the effect of the NITU was inchoate; it merely threatened to permanently impinge plaintiff's property rights." *See* slip op. at 3.

Plaintiffs find *Illig* inapposite because the Trail Use Agreement was signed on the same date the deed was executed. However, plaintiffs' argument cannot overcome the established case law discussed above. The mere coincidence that the *Illig* Trail Use Agreement was signed on the same date that the deed passed does not displace the reasoning that the court enunciated in reaching its conclusion in the case.

The Federal Circuit, in *Creppel v. United States*, 41 F.3d 627 (Fed.Cir.1994), addressed the question of claim accrual in the context of an EPA procedure that allegedly effected a taking. Plaintiff landowners brought takings claims after the Army Corps of Engineers engaged in a flood control project. Phase I of the project began in 1964 and finished in 1973. Phase II commenced in 1974, but

was halted that year while the Corps determined if the project complied with the Clean Water Act. In 1976 the Army issued the so-called Wilson Order that eliminated plaintiffs' expectation of land reclamation pursuant to the project. The EPA concurred with this result. Plaintiffs successfully overturned the order in court. In 1984 the EPA began proceedings to determine whether to stop the project by denying it a permit. The EPA issued a Final Determination on October 16, 1985, permanently blocking the project. Plaintiffs brought four consolidated takings claims in the Court of Federal Claims in 1991. Defendant moved to dismiss the claims as untimely, and the trial court ruled that the claims were barred by section 2501 because the takings were fixed at the date of the Wilson Order.

The Federal Circuit reversed, holding:

> The EPA's Final Determination "fixed the liability" of the Government. . . . On this date, the EPA finally fully vetoed the original Project and allegedly denied the claimants the ability to make economically viable use of their property. The EPA hearings on whether to [block the project] did not fix the alleged liability of the Government because the outcome was unknown until the Final Determination issued. . . . The alleged taking therefore accrued when the EPA issued its actual . . . order, not when it started to consider whether to prepare such an order.

41 F.3d at 634. Similarly, issuance of the NITU does not determine the results of the Government's action in the case at bar. The taking becomes fixed only after the parties reach a Trail Use Agreement. Before that date the outcome of the Government action is not certain, so the taking has not been effected.

Although other decisions issuing from this court do not constitute binding precedent, they are helpful in guiding the court to decide cases that are not governed by appellate decisions. The reasoning in *Smith* and *Illig* is sound and is also consistent with Federal Circuit precedent in *Creppel.* Defendant has presented no persuasive argument for jettisoning the analysis that focuses on the permanence of the taking in order to determine when the statute of limitations was triggered. Similarly, plaintiffs have not presented a sustainable argument that the required permanence under takings law occurs only when the deed to the land passes to the interim user. For the purposes of a Fifth Amendment taking in the context of the Trails Act, the court holds that the Government taking is fixed upon the signing of the Trail Use Agreement. At that time the provisions of the NITU become permanent, depriving plaintiffs of their rights in the land in question.

CONCLUSION

In the case at bar, the City notified the ICC that the parties had reached the Trail Use Agreement on July 5, 1996. Because plaintiffs' claim was not filed until October 7, 2002 – more than six years after the Agreement was announced – that claim is barred by the applicable statute of limitations and must be dismissed.

Accordingly, based on the foregoing, defendant's motion to dismiss is granted, and the Clerk of the Court shall dismiss the complaint without prejudice for lack of subject matter jurisdiction.

No costs.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III, for Themselves and as Representatives of a Class of Similarly Situated Persons,	No. 02-1347L
Plaintiffs,	(Filed Aug. 11, 2003)
v.	
THE UNITED STATES,	
Defendant.	

James P. Kelly, Atlanta, GA, for plaintiffs. *Jeffrey O. Bramlett, John E. Floyd, Benjamin E. Fox*, and *Sarah M. Shalf*, Bondurant, Mixson & Elmore, LLP, Atlanta, GA of counsel.

Kristine S. Tardiff, Concord, MH, with whom was *Assistant Attorney General Thomas L. Sansonetti*, Washington, DC, for defendant. *Evelyn Kitay*, Surface Transportation Board, of counsel.

ORDER

Plaintiffs on July 15, 2003, filed Plaintiffs' Motion for Reconsideration, and To Alter or Amend the Judgment. The court, by order entered on July 21, 2003, expedited briefing. Defendant responded on July 28, 2003, and plaintiffs replied on August 4, 2003.

As expressed during the oral argument on June 11, 2003, the court is mindful of the draconian bar of the statute of limitations in actions against the United States. Congress has delimited the court's power to entertain cases based on considerations of both subject matter and timeliness, and the appellate courts rigorously have applied the six-year bar of 28 U.S.C. § 2501 (2002).

Plaintiffs invoke the tolling effect of filing a class action established in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), and its progeny, based on the pendency of a parallel class action in federal district court in Kansas, *Swisher v. United States*, No. 98-1352-KHV (D. Kan., filed Dec. 22, 1998), to shield them as asserted members of the class who would have been parties had the Kansas suit been permitted to continue as a class action. Putting aside the failing argument that the pendency of the Kansas class action and the July 26, 1999 order transferring suits to the individual districts in which the *Swisher* plaintiffs reside was unknowable to plaintiffs, they argue that, because their action could have been brought in federal district court (pleading damages of $ 10,000.00 or less), they should come within the tolling umbrella of *Swisher*. This argument cannot dislodge the fact that plaintiffs chose an alternate forum with different jurisdictional requirements. Thus, they stand in the position of potential members of the *Swisher* class once removed, or, as defendant puts it, as a "subclass." Def.'s Br. filed July 28, 2003, at 14. Whether plaintiffs, in fact, should be regarded as a subclass or whether they are "piggybacking [a] successive class action[] to keep the claims of individual class members alive despite their inaction," *id.* at 13, no case cited supports plaintiffs'

extension of the *American Pipe* jurisprudence in the circumstances presented.

The court has reviewed carefully plaintiffs' motion under the standards for granting relief called for in both RCFC 59(a) and 60(b)(2). In addition to the foregoing, defendant has responded thoroughly and accurately to each of plaintiffs' arguments, and the court therefore also denies plaintiffs' motion based on the reasons set forth in defendant's response. Accordingly,

IT IS ORDERED, as follows:

Plaintiffs' motion for reconsideration is denied.

Christine Odell Cook Miller
Judge

United States Court of Appeals
for the Federal Circuit

03-5152

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III (for themselves and as representative of a class of similarly situated persons),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that hear the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 30, 2005.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: March 23, 2005

US Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1295(a)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

. . .

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

. . .

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28 U.S.C. § 1346(a)(1) ("Little Tucker Act")

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any

sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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28 U.S.C. § 1491(a)(1) ("Tucker Act")

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics

and Space Administration shall be considered an express or implied contract with the United States.

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28 U.S.C. § 2401(a) Time for commencing action against United States.

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

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28 U.S.C. § 2501 Time for filing suit.

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

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16 U.S.C. § 1247 State and local area recreation and historic trails

. . .

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior

Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

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49 U.S.C. § 10502 Authority to exempt rail carrier administration.

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part –

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either –

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class

exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

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49 U.S.C. § 10903 Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to –

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include –

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance

with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall –

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to

protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) of this title.

(c)(1) In this subsection, the term "potentially subject to abandonment" has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall –

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may –

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board –

(1) finds public convenience and necessity, it shall –

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

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49 C.F.R. § 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any

potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness
To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, ___ (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by ___ (Railroad) and operated by ___ (Railroad). The property, known as ___ (Name of Branch Line), extends from railroad milepost ___ near ___ (Station Name), to railroad milepost ___, near ___ (Station name), a distance of ___ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-___ (Sub-No. ___).

A map of the property depicting the right-of-way is attached.

___ (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible

future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

. . .

(d) Exempt abandonment proceedings.

(1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the

interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the one-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by

assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

INTERSTATE COMMERCE COMMISSION
DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT
[Service Date: August 31, 1994]

Docket No. AB-290 (Sub-No. 145X)
NORFOLK SOUTHERN RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN MUSCOGEE, COUNTY, GA

Decided: August 26, 1994

A notice of exemption was served and published in the Federal Register on July 26, 1994 (59 FR 37990) with respect to the abandonment by Norfolk Southern Railway Company (NS) under 49 CFR 1152 Subpart F – *Exempt Abandonments* of approximately 7.4 miles of rail line from milepost 90.0 at Meyer to milepost 97.4 at Columbus, in Muscogee County, GA. The exemption was scheduled to become effective on August 25, 1994.

On August 15, 1994, the Commission's Section of Environmental Analysis (SEA) advised that according to the Georgia State Historic Preservation Officer (GSHPO) the proposed abandonment may affect historic resources eligible for listing in the National Register of Historic Places. Therefore, SEA recommends that a condition be imposed requiring NS to retain its interest in and take no steps to alter the integrity of the line and any of its structures until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Also, on August 15, 1994, the City of Columbus, Georgia (Columbus), requested issuance of a notice of interim trail use (NITU). Columbus submitted a statement expressing its willingness to assume for the right-of-way full responsibility for management, payment of taxes, and

any legal liability arising out of its transfer or use, as required at 49 CFR 1152.29. Columbus also acknowledged that the use of the right-of-way as a trail is subject to future reactivation for rail service. By letter filed August 17, 1994, NS agreed to negotiate with Columbus for interim trail use.

Based on NS's willingness to negotiate trail use, a NITU will be issued under 49 CFR 1152.29. The parties may negotiate an agreement during the 180-day period prescribed below. If no agreement is reached within 180 days, NS may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is reopened.

2. The notice of exemption published in the Federal Register on July 26, 1994, is modified to the extent necessary to implement interim trail use/rail banking, as set forth below, and to impose the condition that NS retain its interest in and take no steps to alter the integrity of the line and any of its structures until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

3. Subject to the condition set forth above, NS may discontinue service, cancel tariffs for the line on not less than 10 days' notice to the Commission, and salvage track and related materials consistent with interim trail use/rail banking after the effective date of this decision and notice.

Tariff cancellations must refer to this decision and notice by date and docket number.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the right-of-way during the term of the agreement, full responsibility for its management, for any liability arising out of its transfer or use (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any taxes.

5. Interim trail use/rail banking is subject to the future restoration of rail service.

6. If the user intends to terminate trail use, it must send the Commission a copy of this decision and notice and request that it be vacated on a specific date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, NS may fully abandon the line.

8. This decision is effective on its service date.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Acting Secretary

INTERSTATE COMMERCE COMMISSION
DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT
[Service Date: June 2, 1995]

Docket No. AB-290 (Sub-No. 3X)
GEORGIA MIDLAND RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY – ABANDONMENT AND
DISCONTINUANCE OF SERVICE EXEMPTION – IN SPALDING, PIKE, MERIWETHER, TALBOT, HARRIS, AND MUSCOGEE COUNTIES, GA

Docket No. AB-290 (Sub-No. 145X)
NORFOLK SOUTHERN RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN MUSCOGEE COUNTY, GA

Decided: May 25, 1995

In Docket No. AB-290 (Sub-No. 145X), a notice of exemption was served and published in the *Federal Register* on July 26, 1994 (59 FR 37990), with respect to the abandonment by Norfolk Southern Railway Company (NS) under 49 CFR 1152 Subpart F – *Exempt Abandonments* of approximately 7.4 miles of rail line from milepost 90.0 at Meyer to milepost 97.4 at Columbus, in Muscogee County, GA. The exemption was scheduled to become effective on August 25, 1994. By decision served August 31, 1994, a notice of interim trail use or abandonment (NITU) was issued authorizing negotiations between NS and the City of Columbus (Columbus) over use of the right-of-way as a trail. The NITU negotiating period was to expire on February 27, 1995.

On February 23, 1995, NS and Columbus jointly moved for a 180-day extension of the NITU negotiating period. NS and Columbus also requested modification of

the NITU to include an additional 3.2 miles of rail line from milepost 86.8 to milepost 90.0 at Meyer, in Muscogee County, that was at issue in *Georgia Midland Railway Company and Southern Railway Company – Abandonment and Discontinuance of Service Exemption – In Spalding, Pike, Meriwether, Talbot, Harris, and Muscogee Counties, GA*, Docket No. AB-290 (Sub-No. 3X) (ICC served June 15, 1988). NS states that it has not removed the tracks or taken any other action to consummate the abandonment of this 3.2-mile segment. The 3.2-mile segment is contiguous to the mileage involved in the instant proceeding and, according to NS and Columbus, is a "significant component" of the alternative transportation system proposed by Columbus. Columbus submitted a statement of willingness to assume financial responsibility for the additional 3.2-mile segment on May 19, 1995.

The requested extension and modification will promote the establishment of trail use and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d). As long as an abandonment has not been consummated and the railroad agrees to negotiate, the Commission will accept late-filed trail use requests. *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 157-158 (1987). The requests will be granted.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The NITU negotiation period in Docket No. AB-290 (Sub-No. 145X) is extended to August 26, 1995.

2. With respect to the above described 3.2-mile segment, Docket No. AB-290 (Sub-No. 3X) is reopened and consolidated with the NITU issued in Docket No. AB-290 (Sub-No. 145X).

3. This decision is effective on its service date.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

SURFACE TRANSPORTATION BOARD[1] DECISION
Service Date: August 6, 1996

Docket No. AB-290 (Sub-No. 145X)
NORFOLK SOUTHERN RAILWAY COMPANY –
ABANDONMENT EXEMPTION –
IN MUSCOGEE COUNTY, GA

Docket No. AB-290 (Sub-No. 3X)[2]
GEORGIA MIDLAND RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY – ABANDONMENT
AND
DISCONTINUANCE OF SERVICE EXEMPTION –
IN SPALDING, PIKE, MERIWETHER, TALBOT,
HARRIS, AND MUSCOGEE COUNTIES, GA

Decided: August 2, 1996

In Docket No. AB-290 (Sub-No. 145X), a notice of exemption was served and published in the *Federal Register* on July 26, 1994 (59 FR 37990), with respect to the abandonment by Norfolk Southern Railway Company (NS), under 49 CFR 1152 Subpart F – *Exempt Abandonments*, of

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] By decision served June 2, 1995, this proceeding was reopened and consolidated with the NITU issued in Docket No. AB-290 (Sub-No. 145X) with respect to the 3.2-mile segment at issue.

approximately 7.4 miles of rail line from milepost 90.0 at Meyer to milepost 97.4 at Columbus, in Muscogee County, GA. The exemption was scheduled to become effective on August 25, 1994. By decision served August 31, 1994, a notice of interim trail use or abandonment (NITU) was issued authorizing negotiations between NS and the city of Columbus (Columbus) over use of the right-of-way as a trail. By further decision served June 2, 1995, the NITU negotiating period was extended to August 26, 1995, and the NITU was modified to include an additional 3.2 miles of rail line from milepost 86.8 to milepost 90.0 at Meyer, in Muscogee County, that was at issue in Docket No. AB-290 (Sub-No. 3X).

On July 3, 1996, Columbus moved for a further extension of the NITU negotiating period, through and including November 1, 1996. Columbus represents that this motion has the consent of both NS and The Georgia Midland Railway Company. A railbanking agreement has been reached by the parties, and the extension is requested to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager.

An extension of the NITU negotiating period is warranted. The requested extension will promote the establishment of trails and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d). As long as an abandonment has not been consummated and the railroad agrees to negotiate, the Board's jurisdiction is not terminated. *See Missouri Pac. R. Co. – Aband. in OK*, Docket No. AB-3 (Sub-No. 63) (ICC served Jan. 2, 1990). The requested extension will be granted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The NITU negotiating period for the lines described above is extended through November 1, 1996.

2. This decision is effective on its service date.

Vernon A. Williams

Secretary

Supreme Court, U.S.
FILED
JUL 25 2005
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(2)

No. 04-1728

SL 13 PAGE

IN THE

Supreme Court of the United States

WILLIAM B. CALDWELL, III, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF (i) NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, (ii) CLASS MEMBERS IN *WILLIAM SCHNEIDER, ET AL. v. UNITED STATES*, AND (iii) JOINED PLAINTIFFS IN *JOHN and CONSTANCE BARCLAY, ET AL. v. UNITED STATES*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Three parties join in this brief as *amici curiae* in support of the petition for writ of certiorari.[1] The parties are, (i) National Association of Reversionary Property Owners ("NARPO"), (ii) certain members of a certified class action, *William Schneider, et al. v. United States*, Case No. 8:99CV0315 (D. Neb.) ("*Schneider* Landowners"), and (iii) fifty joined plaintiffs in *John and Constance Barclay, et al. v. United States*, Civ. No. 04-1119-WEB (D. Kan.) ("*Barclay* Landowners"). (All three *amici curiae* parties are referred collectively to herein as "*Amici* Landowners.")

NARPO is a non-profit, tax exempt foundation established in 1987, and is dedicated to protecting private property ownership in reversionary interests and rights in the servient estate of property burdened by railroad right of way easements. NARPO's first goal is to assist property owners in maintaining their complete land ownership and resisting unwarranted or unlawful confiscation of private property. When recreational trail use of abandoned railroad rights of way are properly authorized under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (2005) ("Trails Act") and have been implemented, NARPO assists property owners with understanding their rights for seeking just compensation under the Fifth Amendment to the United States Constitution, *e.g., Preseault v. ICC*, 494 U.S. 1 (1990) ("*Preseault I*"), and finding resources or counsel to help them with their efforts.

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[1] Pursuant to SUP. CT. R. 37.2(a), at the request of undersigned counsel, the parties William Caldwell, III, *et al.*, Petitioner, and United States, Respondent, have consented to the filing of this brief.

Pursuant to SUP. CT. R. 37.6, undersigned counsel states that she authored this brief in whole and that no person or entity, other than the *amici curiae*, has made any monetary contribution towards the preparation of this brief.

NARPO has over six hundred members on its mailing list, many of whom are representatives for community groups or other associations dedicated to shared goals with NARPO. NARPO estimates that over 100,000 landowners nationwide own property abutting or traversed by railroad rights of way that are subject to a Notice (or Certificate) of Interim Trail Use or Abandonment Decision ("NITU" or "CITU") at issue here.[2]

Schneider Landowners are members of a subclass of a certified litigation class who own property interests traversed by three recreational trails. The class action alleges a taking of class members' properties when former railroad rights of way were converted to recreational trail use under the Trails Act. Two of the trails are located in the city of Omaha, Nebraska, and one in Nemaha and Otoe counties in Nebraska. Their claims may be subject to dismissal under *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) (2-1 decision) (Newman, J., dissenting). Undersigned counsel is Principal Attorney in that case.

Barclay Landowners comprise fifty individuals who have joined to file a rails-to-trails takings claim concerning three trails located in McPherson, Marion, Lyon, and Morris counties, Kansas. Their claims were dismissed by the United States District Court for the District of Kansas under application of *Caldwell* and an appeal is currently pending in the United States Court of Appeals for the Federal Circuit, Appeal No. 05-1255. Undersigned counsel is Principal Attorney in that case.

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[2] This figure is derived as follows: The Rails to Trails Conservancy ("RTC") estimates there are some 14,341 miles of right of way subject to recreational trails use or plans. *RTC News, Trail Facts & Information, available at* http://www.railtrails.org/news/trailfacts/natmilcount.asp (visited July 24, 2005). Under a conservative assumption that 75% of those trails were authorized under the Trails Act, and that nationwide there are ten property owners per mile (perhaps an excessively conservative assumption), then the number of landowners subject to Trails Act linear parks are 107,557.

STATEMENT OF THE CASE

Amici Landowners adopt and incorporate Petitioner's statement of the case and add the following.

I. STATUTORY AND REGULATORY FRAMEWORK

The Surface Transportation Board ("STB")[3] has exclusive and plenary authority over the construction, operation and abandonment of most of the nation's interstate railway lines. *See Preseault I*, 494 U.S. at 8; *see also id.* at 5-8 (chronicling history of Trails Act and related authority). When a railroad company wishes to abandon one of its lines, it must receive permission to do so from the STB. *Id.* Its options include filing for abandonment under 49 U.S.C. § 10903, or petitioning for exemption from those proceedings under 49 U.S.C. § 10502.[4] If the railroad satisfies procedural contingencies and consummates abandonment of its line pursuant to either § 10903 or § 10502, the STB's jurisdiction ceases and "state law reversionary interests, if any, take effect." 391 F.3d at 1228-29 (citing *Preseault I*).

To forestall the loss of railroad rights of way nationwide, Congress has passed, *inter alia*, the Trails Act which provides that in lieu of outright abandonment, railroad rights of way may be converted into recreational trail use. § 1247(d). This process accomplishes the Congressional objective of "preserv[ing] established railroad rights of way for future reactivation of rail service . . . protecting rail transportation corridors, and encouraging energy efficient transportation use . . ." *Id.*

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[3] The STB assumed authority over the federal railway system on January 1, 1996, as the successor agency to the Interstate Commerce Commission ("ICC"). 49 U.S.C. § 702. For ease of reference, the agencies shall be referred to as "STB" herein.

[4] Formerly 49 U.S.C. § 10505 in materially similar form. Repealed, effective January 1, 1996, by I.C.C. Termination Act of 1995, Pub. L. 104-88, 109 Stat 803 (1995).

Preserving railways for possible future restoration, while in the meantime employing them for recreational trail use, is known as "railbanking." *E.g., Caldwell,* 391 F.3d at 1229.

A trail sponsor who is interested in negotiating with the railroad to convey the right of way into recreational use will file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a).[5] If it is willing to negotiate with the trail sponsor, the railroad shall inform the STB, and the STB will issue a NITU. 49 C.F.R. §§ 1152.29(b)(2) & (d). The NITU allows for a 180-day period for the railroad to negotiate with a trail sponsor and also permits the railroad company to discontinue service, cancel tariffs, and salvage tracks and other equipment consistent with railbanking. *Id.* With good cause, the NITU may be extended by the STB for additional 180-day increments. *See* 391 F.3d at 1230.

A NITU may also run concurrently with other STB agency proceedings that are unrelated to the Trails Act. 49 C.F.R. § 1152.28(b). Under exemption proceedings, a qualified party may apply for post-abandonment public trail use *or other public uses*, including highway or other transportation uses. 49 U.S.C. § 10905[6]; *see Rail Abandonments–Use of Rights of Way as Trails,* Ex Parte No. 274 (Sub-No. 13), 2 I.C.C.2d 591, 603 (1986) (Commission comment). Known as a "public use condition," this proceeding can not be extended beyond the maximum time allowed of 180 days. 49 C.F.R. § 1152.28(b).

The NITU is described by the STB as being "dual-purpose." 2 I.C.C.2d at 612. On the one hand, the NITU provides for the railroad company and trail sponsor to negotiate and ultimately consummate an agreement for trail use. § 1152.29(d)(1). On the other hand, if the parties fail to reach agreement within the 180 days, the NITU "will convert into an effective notice of

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[5] In abandonment § 10903 proceedings, 49 C.F.R. § 1152.29(b)(1)(ii) governs in a materially similar fashion and the STB will issue a Certificate of Interim Trail Use ("CITU").

[6] Formerly 49 U.S.C. § 10906. *See* Note 4, *supra*.

exemption, permitting the railroad to abandon the line immediately." 2 I.C.C.2d at 612.

If the rail carrier reaches an agreement with the trail manager, then on the effective date of that conversion the trail manager assumes full responsibility for managing the right of way, for any legal liability arising out of the use of the right of way, and for the payment of all taxes. § 1152.29(a). The effective date of conversion to trail use is generally at the time of "transfer, lease, donation, sale, or otherwise" of the right of way. 16 U.S.C. § 1247(d); 2 I.C.C.2d at 608 ("If the right of way is acquired from the railroad, its liability ends with the severance of its property interest.").

The NITU is prospective, is not self-executing, and requires additional steps on the part of the rail carrier before either of the two options authorized by the NITU will take legal effect. *See* § 1152.29. Additionally, the NITU does not *require* that the railroad consummate an agreement for rails-to-trails conversion or abandon the right of way. §§ 1152.29(d), (e)(2); *see also National Wildlife Federation v. ICC*, 850 F.2d 694, 700-02 (D.C. Cir. 1988). As noted by the United States Court of Appeals for the Eighth Circuit,

> issuance of an NITU or CITU is not only incidental to the abandonment, but also is itself not a guarantee of eventual trail use. The NITU or CITU serves only "to provide an opportunity for the railroad and prospective trail users to negotiate an agreement; thus, when [the STB] issue[s] a NITU or CITU there is only a *possibility* that a particular right of way actually will be used as a recreational trail."

Goos v. ICC, 911 F.2d 1283, 1293 (8th Cir. 1990) (quoting ICC) (emphasis in the original).

A third option available to the railroad company *during the pendency of the NITU* is to continue with railroad operations

on the subject right of way. Under 49 C.F.R. § 1152, *et seq.*, while there can be no "local traffic" for two years at the time the petition for exemption is filed, there can still be "overhead traffic" which can be rerouted if there is an effective rails-to-trails conversion or abandonment of the line. 49 C.F.R. § 1152.50(b).

II. Practical Application of NITUs or CITUs

Under its conditional terms, a NITU or CITU can lead to a number of possibilities.

The issuance of a NITU or CITU can, of course, serve as authorization to convert the line to trail use or to fully abandon an unwanted segment of right of way, §§ 1152.29(d), (e)(2), with any attendant property interests thereto restored to their owner. *E.g.*, *Preseault I*, 494 U.S. at 20-21 (O'Connor, J., *concurring*). The STB's conditions are formulaic and recited in a typical NITU or CITU:

> If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, UP may fully abandon the line.

Union Pacific R.R. Co.–Abandonment Exemption–In McPherson County, KS (McPherson Branch), STB Docket No. AB-33 (Sub-No. 89X), *NITU*, 1995 WL 569357, at *2 (ICC, Sept. 28, 1995) ("*UP NITU*").

During the pendency of a NITU, trains may still be running on the right of way. *Id.* at *1 (noting the railroad's continued plans for use of the right of way for "overhead traffic."). Other use conditions for the railroad right of way may concurrently be pending, where in lieu of trail use, for example, other railway transportation purposes may be implemented. *Id.* (noting authorization of a public use condition).

A NITU or CITU may mark the start of a period lasting six or more years, where no trail use conversion is consummated during that period. *See Southern Pac. Transp. Co.–Abandonment Exemption–Wendel-Alturas Line in Modoc and Lassen Counties, CA, Decision*, Docket No. AB-12 (Sub-No. 184X), 2004 WL 1941838 (STB, Service Sept. 1, 2004) (extending the NITU negotiating period until September 3, 2005–more than nine years after the first NITU was served and without consummation of trail use); *CSX Transp., Inc.–Abandonment Exemption–In Franklin County, PA, Decision*, Docket No. AB-55 (Sub-No. 568X), 2005 WL 189881 (STB, Service January 28, 2005) (extending authorization to abandon the line until September 27, 2005, and the trail negotiating period until July 29, 2005–more than six years after the first NITU was served and without consummation of trail use).

A NITU or CITU, can result in a mixed outcome, such as in Texas, where not until eight years after its issue, did a CITU lead to a trail use on part of the segment, with the rest subject to authorization for full abandonment and where thirteen years after the original CITU, the trail use authorization was revoked and the entire segment was subject to authorization for abandonment. *St. Louis Southwestern Ry. Co.–Abandonment Exemption–In Smith and Cherokee Counties, TX, CITU*, Docket No. AB-39 (Sub-No. 12), 2002 WL 383570 (STB, Service March 12, 2002).

SUMMARY OF THE ARGUMENT

Under *Caldwell*, the rule of law in all rails-to-trails cases is that a taking accrues *before the indispensable event to fix the Government's liability has occurred.* The *Caldwell* majority reached this result by violating rules set out in Supreme Court precedent including, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23 (2002), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Overlooking controlling precedent, the court applied

half-formed regulatory takings principles to a physical takings case and physical takings jurisprudence to an indeterminate regulatory proceeding. The result is a novel rule of law which violates this Court's pronouncements on regulatory and physical takings jurisprudence and conflates the two into a vague, unworkable hybrid.

The novel rule affects potential claimants for tens of thousands if not hundreds of thousand of homes and properties across the nation. The rule invites unripe claims–in some cases requires them–and precludes those that have not been brought during indeterminate agency proceedings under a NITU and before a taking is fixed. As explained below, the *Caldwell* court arrived at this rule because it failed to apply well-settled principles that separate physical from regulatory takings cases. This rule of law should be reviewed by the Court because it controls all takings cases brought against the United States that involve the Trails Act and any other, analogous claims over which the Federal Circuit has exclusive control.[7]

1. Proof of Liability. A rails-to-trails takings case hinges entirely on the plaintiff being able to establish that the rail carrier's transfer of its interests to recreational use worked a taking of her property. *Preseault I*, 494 U.S. at 20-21; *Preseault v. United States,* 100 F.3d 1525, 1549-50 (Fed. Cir. 1996) ("*Preseault II*"); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). That transfer of interest and change from railroad use to recreational use along a linear park puts a new and different burden on the servient estate, entitling the plaintiff to just compensation. *E.g.*, 376 F.3d at 1376. Without such showing, the government is not liable. *See id.* It is axiomatic, therefore, that this *indispensable* event to establish liability–rails-to-trails conversion–fixes the date for the accrual of a claim. The *Caldwell* majority failed to consider that a takings claim

[7] There can never be a "split" in circuits on point because the Federal Circuit has exclusive jurisdiction over all takings cases brought against the United States. *See* 29 U.S.C. § 1295(a)(2) (2004).

based on a NITU decision alone would be unripe, and in so doing it erred.

2. Per Se Physical Taking. A rails-to-trails takings claim falls under the category of a *per se* physical taking. As a physical takings claim, it is subject to the analyses and rules set out by this Court in physical appropriation cases, and regulatory takings analyses should not be applied. *Tahoe-Sierra*, 535 U.S. at 322-23. Under physical takings jurisprudence, until conversion from railroad use to recreational trail use pursuant to a NITU is consummated, there is no effective physical appropriation of a landowner's property. Until then, no third party is physically intruding upon or occupying the landowner's property. Therefore, a rails-to-trails claim can accrue no earlier than the effective date of transfer of the railroad's interest to a trail manager pursuant to federal authority. The *Caldwell* majority impermissibly fashioned an amalgam of regulatory and physical takings concepts and thereby overlooked the critical flaw in its holding: a conditional NITU cannot mark the start of a physical takings case.

3. Regulatory Takings Test. As issued, a NITU or CITU will not pass a regulatory takings analysis under the *Lucas* and *Penn Central* factors and therefore cannot mark the accrual of any takings claim. In most, if not all, rails-to-trails conversions the right of way burdens only a portion of a property and there is no "total taking" under *Lucas*. And the circumstances of a NITU or CITU cannot satisfy the *Penn Central* factors. First, there is no economic impact to the property until the trail conversion is consummated. Until then the "before and after" analysis remains the same with an existing, unabandoned railroad burdening the property both before and after issuance of the NITU/CITU. Second, under the investment-backed expectation test, the landowner would need to show he bought his property in reliance on the nonexistence of the challenged regulation. The Trails Act has been in existence for decades and other regulations potentially blocking abandonment even longer. *Cf. Preseault I*, 494 U.S. at 5-8.

Moreover, a NITU does not mark a point where proceedings are effectively final under the rubric of regulatory takings jurisprudence because it contains express conditions which must be satisfied before any conversion is authorized. The *Caldwell* majority failed to consider *whether* the issuance of a NITU could ever rise to a regulatory taking claim before its conditional terms are satisfied. The court avoided this question by reasoning that if no trail use is reached, a NITU could support a temporary taking. This predicate to the *Caldwell* rule of law is in direct violation of this Court's holding in *Tahoe-Sierra* concerning a "temporary" regulatory taking.

For these separate reasons, the *Caldwell* holding–"the appropriate triggering event for any takings under the Trails Act occurs when the NITU is issued," thereby "halting abandonment and the vesting of state law reversionary interests," 391 F.3d at 1235–is contrary to controlling precedent and should be reviewed by this Court and reversed.

ARGUMENT

I. A CLAIM CANNOT ACCRUE UNTIL THE INDISPENSABLE EVENT FIXING LIABILITY TRANSPIRES.

In rails-to-trails takings cases, the question of liability hinges on showing that the original railroad easement was put to a use different from the one permitted under the original grant. *Toews*, 376 F.3d at 1376 (observing the "defining issue in [a rails-to-trails takings] case is the question of the scope of the easements originally granted to the railroad."); *see also, Preseault I*, 494 U.S. at 20 ("state law determines what property interest petitioners possess and [] traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on [the] property"); *id.* at 21 ("reference to state law has guided other courts seeking to determine whether

a railway right of way lapsed upon the conversion to trail use."). Without that showing, the claim will fail. *See id.*; *compare Preseault II, supra, with Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999) (holding rails-to-trails conversion not a taking where, under Maryland state law, the railroad easements were sufficiently broad to contemplate trail use). It is axiomatic, therefore, that a rails-to-trails taking claim cannot accrue until a new "burden [is] imposed on any property interest they possess, i.e., when the "railway right of way lapsed upon the conversion to trail use." *See Preseault I* , 494 U.S. at 20-21.

Until that point, and while a "dual-purpose" NITU issued by the STB permitting *either* abandonment *or* recreational trail use is pending, the requisite elements to establish a taking are not satisfied. During the pendency of a NITU, the railroad is still responsible for taxes on the right of way. 2 I.C.C.2d at 608. In addition, the right of way may still be used for overhead traffic by the railroad company itself. *UP NITU,* 1995 WL 569357, at *1. And if there is a public use condition pending, *id.*, then the right of way may end up being transferred to another party for non-trail purposes. Even if none of those activities are taking place, the law requires *more* than the events transpiring before and during the pendency of a NITU to support a takings claim. *E.g., Preseault I, Preseault II, Toews, supra.* The law requires proof that the trail conversion was outside the scope of the original railroad use which, by necessity, means the NITU alone cannot trigger a taking.

As such, the *Caldwell* court's holding must be reviewed and reversed.

II. A RAILS-TO-TRAILS TAKING ACCRUES NO EARLIER THAN WHEN THE PROPERTY IS PHYSICALLY APPROPRIATED.

Physical takings doctrine, and not regulatory takings jurisprudence, applies in analyzing liability in a rails-to-trails case. *Preseault II*, 100 F.3d at 1540 (rejecting the government's theories of liability under any regulatory takings jurisprudence: "[p]lacing restraints on an owner's use of her property invokes the regulatory takings issue, rather than the question of the Government's physical occupation of private property, and both factually and legally raises significantly different issues."). That finding is consistent with *per se* takings jurisprudence as has been explained by this Court over the decades. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987); *Tahoe-Sierra*, 535 U.S. at 322-23.

In *per se* physical takings cases, courts must observe the distinctions between physical and regulatory takings jurisprudence. Just as those distinctions are critical in determining *whether* there has been a taking, *Tahoe-Sierra*, 535 U.S. at 322-23, the distinctions apply in evaluating *when* the taking occurred. *Cf. id.*; *see Clark v. United States*, 445 U.S. at 253, 258 (1980).

In *Tahoe-Sierra*, the Court explained the importance of keeping the two analyses separate:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.

Id. at 322-23; *see also id.* at 330 n.25; *Preseault II*, 100 F.3d at 1540 ("As the Supreme Court makes clear, these two quite different situations call for quite different analyses.").

The Court's admonishment not to confuse the two takings paradigms should apply squarely to questions concerning *accrual* of a takings claim. This Court's discussions concerning physical takings cases support no other conclusion and the rule has been stated generally by the Court itself.

In *Clark, supra*, the Court considered whether the physical appropriation of allotted Indian trust lands pursuant to a condemnation statute, but without the initiation of condemnation proceedings, constituted permissible *per se* physical takings under the rubric of "inverse condemnation" theories. 445 U.S. at 256-8. The Court concluded the taking was not authorized and based the decision in part on the question of *when a physical taking by invasion can be deemed to accrue*:

> When a taking occurs by physical invasion, on the other hand, the usual rule is that *the time of the invasion* constitutes the act of taking, and "[i]t is that event which gives rise to the claim for compensation *and fixes the date* as of which the land is to be valued.

Id. at 258 (quoting *Dow v. United States*, 357 U.S. 17 (1958)) (emphases added); *cf. Loretto*, 458 U.S. at 426 ("'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative*") (emphasis added); *Nollan*, 483 U.S. at 832 ("'a permanent physical occupation' [] occur[s], for purposes of th[e *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro . . .").

In any rails-to-trails case, the property is not physically appropriated by the Government, of course, but by a trail manager acting pursuant to the Government's authority. *E.g., Preseault II*, 100 F.3d at 1551. The earliest a trail manager acquires the right to physically occupy a right of way and invite the public to pass to and fro is when the railroad transfers its interests to the manager pursuant to a NITU. § 1247(d). Until that transfer, the railroad, who has typically owned the

corridor spanning centuries, continues as the sole owner and occupier of the right of way. *See* 2 I.C.C.2d at 608. The NITU affords no more rights to the trail manager and the public to occupy the right of way than they had prior to its issuance. *Cf. id.*

In *Caldwell*, the court did not undertake an analysis rooted in *per se* physical takings law nor for that matter in regulatory law and instead appeared to conflate the two. The court recognized that "[t]he task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator," but emphasized that "the issuance of the NITU is the only *government* action in the railbanking process." 391 F.3d at 1233-34 (emphasis in the original). But while the issue of the advent of the governmental action may have relevance in establishing the date of accrual in a regulatory taking case *if* the governmental action is *final*, *see* § III, *infra*, the governmental action in a *per se* physical taking is not definitive for the taking. Rather, the physical occupation is. *See Clark, supra*; *Dow v. United States*, 357 U.S. 17, 22 (1958) ("The owner at the time the Government takes possession 'rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.'") (quoting *23 Tracts of Land, Etc. v. United States*, 177 F.2d 967 (6th Cir. 1949)).

Although recognizing that *Dow* stands for the proposition that liability is fixed, and therefore accrues, at the time of physical intrusion, *Caldwell* 391 F.3d at 1235; *see also, id.* at 1238-9 (Newman, J., *dissenting*), it appears the majority failed to consider that the intrusion in a rails-to-trails case is made by third parties, not the government. As such, the majority did not address when the *third-party* physically appropriated the property. The result from the court's misapplication of regulatory takings law concepts to this physical takings case is the issuance of an unworkable rule of law. Accordingly, the *Caldwell* decision should be reviewed and reversed.

III. A NITU WILL NOT SUPPORT A REGULATORY TAKING AND THEREFORE CANNOT MARK THE ACCRUAL OF A CLAIM.

The issuance of a NITU alone will never, under normal circumstances, give rise to a takings claim. The facts in a rails-to-trails taking do not fit a *Lucas* analysis, nor do they meet the *Penn Central* factors. Moreover, until the conditions set out in a NITU are fully satisfied, there is no "injury in fact" as required to satisfy the finality rule and establish ripeness under regulatory takings jurisprudence. Therefore, the *Caldwell* analyses and holding fails because the Court overlooked and misapplied the controlling precedent on point.

A. A RAILS-TO-TRAILS CLAIM IS NOT SUBJECT TO A *LUCAS* TAKING FRAMEWORK AND WOULD FAIL A *PENN CENTRAL* TEST.

The *Caldwell* decision ultimately suffered from a failure to engage in an appropriate regulatory analysis: "The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* [would be] the proper framework" for determining whether there could be any taking at the time a NITU was issued. *See Tahoe-Sierra*, 535 U.S. at 335. This rule applies whether the taking is permanent or temporary, *id.* at 342, because temporary takings are "no[] different in kind from permanent takings." *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2003).

In a rails-to-trails case, there is no "total taking of the entire parcel," as required under the *Lucas* test. To qualify under *Lucas,* there must be "a 'complete elimination of value,' or a 'total loss'" of the entire, larger parcel–not just the strip of land that is taken. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*). Accordingly, unless the NITU caused a temporary or permanent

"total loss" of the remainder of the property,[8] the *Penn Central* analysis *must be applied. Tahoe-Sierra*, 535 U.S. at 330, 342.

Under the *Penn Central* analysis, the court shall weigh and factor three relevant issues: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment backed expectations; and (3) the character of the governmental action. *See Tahoe-Sierra*, 535 U.S. at 315, n.10. A takings claim predicated on the issuance of a NITU would fail both of the first two tests, and therefore does not give rise to a regulatory takings claim.

"The existence of economic injury is indispensable to demonstrating a regulatory taking." *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). To demonstrate economic injury, there must be an appreciable change in the fair market value of the property before and after the injury. *Id.* at 1371. In the case of a NITU, however, the "before" condition includes an existing railroad right of way and the "after" condition is unchanged. *See generally*, 49 C.F.R. § 1152, *et seq.*; § I, *supra*.

Not until the time of the rails-to-trails conversion is there a difference in the value of the "before and after" condition. Only then will there be a lapsed railroad easement–marking the "before" period–and the newly placed recreational trail–marking the "after" period. *Cf. Moore v. United States*, 54 Fed. Cl. 747 (2002) (addressing damages in a rails-to-trails takings claim); *see also Preseault II*, 100 F.3d at 1549-50. As such, a pending NITU fails the first test.

Moreover, under the second test, the Government's historical position on point has been that the Trails Act is not violative of a landowner's "reasonable expectations." *Preseault II*, 100 F.3d at 1540 ("The Government's attempt to read the concept of 'reasonable expectations' as used in regulatory

[8] In Counsel's experience, a rails-to-trails taking does not result in a taking of the entire remainder although it is conceivable that a *Lucas*-type taking may occur in atypical circumstances.

takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights.").

Putting aside the Government's view, for a regulatory taking claim to be viable a property owner would have to show he "bought his property in reliance on the nonexistence of the challenged regulation." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). This test would require property owners subject to a NITU to establish that their investment-backed expectations were violated by regulations that carve out a discreet window of time where *either* abandonment or trail use may transpire subject to the NITU's conditions being met. They could never meet that burden. Railroads have been subject to various types of regulations restricting the ability to abandon outright their right-of-way interests for decades and at least since the 1920's. *See Hash v. United States*, 403 F.3d 1308, 1317 (2005) (describing federal control over railway corridors). Therefore, unless the Landowners purchased their properties before the 1920's, they would be hard-pressed to establish the violation of their investment-backed expectations due to an agency decision that allowed for proceedings that might lead to full abandonment of the right of way.

B. A Conditional NITU Fails the Finality Test.

The NITU is not "final" under the rubric of regulatory takings jurisprudence: *conditions* are set by the NITU to satisfy the requirements under the Trails Act for trail use and those conditions are not met until there is an effective, consummated agreement between the railroad and trail manager.[9] *See* Statement of the Case, *supra*. In addition, the right of way may end up fully abandoned, may still be used for railroad purposes while the NITU is pending, there may be changes in

[9] An agreement is typically consummated at the time the railroad sells its interests to the trail sponsor, or when that sale is recorded, depending on applicable state law. *Caldwell*, 391 F.3d at 1237 (Newman, J., dissenting).

trail sponsors and revocation of previous NITUs, and there may be concurrent public use conditions which can result in non-trail use. *See id.* Therefore, a NITU is by no means final in its application and the outcome will be unknown until all the conditions of the NITU are satisfied.

C. A NITU Cannot Support a Temporary Taking

Without analyzing the finality rule, the *Caldwell* Court held "[t]he NITU marks the 'finite start' to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued." 391 F.3d at 1235. In so holding, the Court not only failed to consider whether a regulatory analysis *could* apply but overlooked whether the NITU was effectively final under the meaning found in regulatory jurisprudence. Instead, the Court seemingly engaged in circular reasoning, and held that the NITU "operate[d] to preclude abandonment" because that marked the point where state law reversionary interests were "forestalled by operation of the . . . Trails Act." *Id.* at 1233.

But the halting of abandonment for a limited period of time under a NITU no more gives rise to a taking claim than a regulatory action temporarily suspending property development in and of itself works a taking. *See Tahoe-Sierra*, 535 U.S. at 331. To begin with, "of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings." *Id.* In addition, "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication." *Id.* at 335.

That the *Caldwell* decision missed the finality analysis is perhaps due to its misapplication of *Dow*. The Court relied on *Dow* to conclude that even if a NITU *does not lead to trail use*,

it nevertheless will mark the accrual of a "temporary" taking. 391 F.3d at 1234 ("negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred."). In support, the court reasoned, "[a]s the Court observed in *Dow*, the government's decision to abandon the taking 'merely results in an alteration in the property interest taken–from full ownership to one of *temporary use and occupation*.'" *Id.* at 1235 (quoting *Dow*) (emphasis added).

But the *Dow* Court's reasoning on this point hinged entirely and completely on a *physical occupation* to support a temporary taking. 357 U.S. at 26. In the absence of a *physical occupation*, only a regulatory takings analysis can apply. *Tahoe-Sierra*, 535 U.S. at 335. The *Caldwell* Court failed to recognize this critical and fatal distinction when concluding that the NITU potentially gave rise to a temporary taking and therefore failed to engage in the rigorous and complex analysis demanded by regulatory takings jurisprudence. If it had, it would have recognized that there can be no "temporary" taking under regulatory takings law. *See Tahoe-Sierra, supra.* Moreover, under regulatory takings jurisprudence, if an action is not effectively final, it is premature; therefore, no regulatory taking can accrue.

The *Caldwell* decision misapplies regulatory takings doctrine to a physical taking and physical takings doctrine to a regulatory proceeding in violation of this Court's jurisprudence. The result is an unworkable rule of law which should be reviewed and reversed by the Court.

CONCLUSION

For the foregoing reasons, under no circumstances could a NITU alone support any type of taking–physical, regulatory, temporary, or permanent. Therefore it is impossible for a rails-to-trails taking claim to accrue at the time a NITU is issued, unless there has already been a transfer of the interests from the railroad to the trail manager. Nonetheless, *Caldwell* establishes a rule of law which holds that a claim against the United States accrues *before the indispensable event to fix liability has occurred.* Accordingly, *Amici* Landowners join with Petitioners in urging this Court to issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit in this case.

Respectfully submitted,

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